Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CENTURYTEL, INC.,
Petitioner,

v.

BARBRASUE BEATTIE and JAMES SOVIS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Section 206 of the federal Communications Act of 1934 (the "Act"), 47 U.S.C. § 206, provides that a common carrier is liable to a person who is injured by a violation of the Act.

The Sixth Circuit affirmed a class of 500,000 to 700,000 CenturyTel customers who were billed and who paid for an optional CenturyTel service, where CenturyTel's billing description of that service was found to be a violation of the Act.

The Sixth Circuit acknowledged CenturyTel's argument that ~~some (or~~ most, CenturyTel contends) class members affirmatively requested the service (despite being billed for the service under an inadequate description). Nonetheless, the Sixth Circuit effectively eliminated the Act's express injury and causation elements of liability, holding that whether a customer actually suffered an injury caused by the inadequate billing description "goes only to the issue of damages . . . ." (App. 14a).

Accordingly, the question presented for review is: Are injury and causation independent elements of *liability* under section 206 (thus requiring independent analysis as to whether those issues are predominantly individualized for purposes of class certification), or do they "go[] only to the issue of *damages*"?

PARTIES TO PROCEEDINGS

Plaintiffs Barbrasue Beattie and James Sovis are class representatives of a class consisting of residential telephone customers of Defendant CenturyTel, Inc., each of whom paid CenturyTel for an inside wire maintenance service beginning October 29, 2000, described on their telephone bill as "Non-Regulated Services." The district court certified a class estimated to consist of 500,000 to 700,000 residential customers of CenturyTel, Inc.

Defendant CenturyTel, Inc., is a publicly held corporation.

RULE 29.6 STATEMENT

Petitioner CenturyTel, Inc. is a publicly held corporation. There is no parent corporation. Further, there is no publicly held company that owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan granting class certification is reported at 234 F.R.D. 160 (E.D. Mich. 2006), and is reproduced in the appendix at 33a-68a. CenturyTel, Inc. sought permission to appeal from the district court's class certification decision, which was granted on May 2, 2006 (United States Court of Appeals for the Sixth Circuit, Docket No. 06-105). The order granting CenturyTel permission to take an interlocutory appeal is not reported, and is reproduced in the appendix at 31a-32a. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 511 F.3d 554 (6th Cir. 2007), and is reproduced in the appendix at 1a-30a. The order denying CenturyTel's petition for rehearing and suggestion for rehearing en banc is reproduced in the appendix at 69a-70a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 18, 2007. A timely petition for rehearing and suggestion for rehearing en banc was filed on January 2, 2008, and was denied on April 29, 2008. (App. 69a-70a). Petitioner applied for an extension of time within which to file a petition for a writ of certiorari, which was presented to and granted by Justice Stevens. The time within which to file a petition for writ of certiorari was extended to and including September 26, 2008. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Section 201(b) of the federal Communications Act of 1934 provides:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.

47 U.S.C. § 201(b).

Section 206 of the federal Communications Act of 1934 provides:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206.

STATEMENT OF THE CASE

A. General Overview and Background

Defendant CenturyTel, Inc. is the eighth largest local exchange telephone company in the United States, and offers local telephone, internet access, long distance and high speed data services in more than 20 states to more than 1.7 million customers. (App. 3a, 34a).

One of the many services offered by CenturyTel is an inside wire maintenance service plan known as "WireWatch." (App. 3a-4a, 34a-35a). WireWatch is an "unregulated" service not covered by CenturyTel's tariffs or rate filings. (App. at 4a, 35a). WireWatch is similar to an insurance plan, pursuant to which CenturyTel covers the cost of diagnosis and repair of wiring and/or jack damage inside a home, in return for a small monthly fee. (App. 3a-4a, 35a).

CenturyTel's WireWatch program varies from state to state.

> In some states, CenturyTel has offered WireWatch for a number of years, but in others, such as Alabama and Missouri, WireWatch only recently has become available through CenturyTel to its customers. The main reason for this variance is the manner in which CenturyTel has grown through acquisition of other telephone companies.
>
> The state-by-state network of CenturyTel telephone service providers is an amalgamation

> of small companies acquired by CenturyTel over time. As a consequence, the services offered to current customers of CenturyTel historically has [*sic*, have] differed from state to state, and sometimes varied in regions within a single state. Billing formats varied widely as well.

App. 35a.

Historically, the primary manner by which CenturyTel customers have enrolled in WireWatch is through oral communications with CenturyTel's customer service representatives. Generally, customers enrolled in the WireWatch program when they called to arrange for telephone service with CenturyTel or when they called to add to or change their existing service options. During these telephone communications, CenturyTel's customer service representatives would inform the customer of the benefits of, and rates for, WireWatch. CenturyTel did not utilize a uniform script in its oral communications to solicit individual customer subscriptions to WireWatch. (App. 5a).

CenturyTel's historical and extant corporate policy is that each customer is subscribed to and billed for the WireWatch service only after that customer affirmatively and specifically requests to be enrolled in WireWatch, typically, as noted, through a telephonic conversation with a CenturyTel service representative. CenturyTel's policy has at all times (other than upon initial de-regulation of inside wire maintenance service) been that it does not enroll customers in

WireWatch without their express consent.[1] (Affidavit of Graylen Allen, ¶ 13, Ex. A to CenturyTel's Response in Opposition to Plaintiffs' Motion for Class Certification, Record Entry No. 29).

B. District Court Proceedings And Decision

The named plaintiffs are two individual, residential customers of CenturyTel, each of whom resides in Michigan. (App. 6a). The named Plaintiffs alleged that they each were billed for WireWatch pursuant to an inadequate billing description of the charge for WireWatch, from approximately the mid-1990s through January 2002. (App. 6a). Plaintiffs filed a six-count complaint against CenturyTel on behalf of themselves "and all other persons similarly situated." In general:

> The complaint alleges that beginning in at least 1994, and perhaps before that time, defendant CenturyTel has been billing customers for the

[1] The only exception to this policy occurred during the 1986-1987 period of mandatory deregulation of all telecommunications carriers' obligations to provide inside wire repair services to all of their customers as part of their basic telephone service. At that time, the public service commissions of some states in which CenturyTel provided service expressly approved or allowed CenturyTel to continue to provide that service, in the form of a WireWatch subscription, to its then-existing customers who had previously received such repair service protection as part of their regulated telephone service without those customers' authorizations. *See, e.g., In re The Joint Application of Ace Tele. Co. of Michigan, Inc., et al*, Opinion and Order of the Michigan Public Service Commission, issued December 17, 1986 (Case No. U-8608). (Declaration of David D. Cole, ¶¶ 5-6; filed Feb. 28, 2007, Record Entry No. 91).

> maintenance of internal wiring . . . . Up through approximately January of 2002, CenturyTel labeled this charge as one for "Non-Regulated Services." At that time, it reorganized its telephone bills and re-labeled the charge to "Inside Wire Maintenance Plan."

App. 36a. Plaintiffs alleged, in Count I of their complaint, that CenturyTel's "billing actions violate 47 U.S.C. §§ 201(b), 206 and 207, as well as the FCC's Truth-in-Billing regulation, 12 C.F.R. 64.2401 [*sic*, 47 C.F.R. 64.2401]." (App. 38a).

On August 15, 2003, Plaintiffs moved to certify a class. More than two and one-half years later, during which time the matter was held under advisement, the district court issued an opinion and order on March 10, 2006, holding that Plaintiffs "have satisfied the requisites for class certification . . . ." (App. 34a).

The district court noted:

> The plaintiffs agreed that section 201 is not a strict liability statute, and *that to establish a claim under section 206 the plaintiffs would have to show some type of injury*.

App. 54a (emphasis added).

The district court then began its class certification analysis with the determination that "[t]o prevail on their federal claims, the plaintiffs must show that the defendant's billing practices violated section 201 [of the federal Act] *and they were injured by that violation*." (App. 54a (emphasis added)).

However, after apparently recognizing that the causation and injury elements of the claim, as well as damage issues are, under the Act, separate inquiries, the district court ruled incorrectly that the injury and causation elements were subsumed by the court's damages analysis. Accordingly, the district court relied on irrelevant case law holding that certification need not be denied where individual *damage* determinations can be bifurcated: "[T]he necessity of each plaintiff proving the amount of his or her *damages* is generally not an impediment to class certification." (App. 54a-56a (emphasis added)).

The district court ordered certification of the following class pursuant to FED. R. CIV. P. 23(b)(3):

> All persons who have paid CenturyTel, Inc. for charges for an inside wire maintenance insurance program described in CenturyTel's residential telephone bills as "Non-Regulated Services" during the period beginning October 29, 2000, or such earlier period if the charges were not know [*sic*, known] or reasonably could [*sic*, not] have been known by October 29, 2000 . . . .[2]

App. 66a. The district court also granted Plaintiffs' motion for judgment on the pleadings as to Count I and determined that CenturyTel's billing description for WireWatch as "Non-Regulated Services" violated

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[2] Those excluded from the class include CenturyTel, its subsidiaries, affiliates, officers, and directors.

47 U.S.C. § 201(b). (App. 67a). CenturyTel does not here challenge that ruling.

CenturyTel timely petitioned the United States Court of Appeals for the Sixth Circuit for permission to appeal pursuant to FED. R. CIV. P. 23(f). That court granted CenturyTel's petition, concluding that "interlocutory review of the class certification order in this case is warranted." (App. 32a).

C. Sixth Circuit Decision

On appeal, CenturyTel argued that "each class member must establish injury to prove liability under §§ 201 and 206, and 'fact of injury is *not* a common issue among class members,'" thus precluding class certification. (App. 18a). CenturyTel also argued that "the need to prove causation for each plaintiff to show liability demonstrates that individual issues predominate . . . ." (App. 17a). CenturyTel further argued that if CenturyTel "customers made the WireWatch payments because they desired and ordered the service . . . then the manner by which CenturyTel *described* the service is completely irrelevant." (CenturyTel's Sixth Circuit Reply Br at 18-19).

The Sixth Circuit affirmed the certification decision of the district court. (App 28a). In addressing the typicality requirement of Rule 23(a)(3), the Sixth Circuit rejected CenturyTel's argument that "individual issues of liability predominate over common issues, and thereby preclude a finding of typicality. . . ." (App. 14a)

> To establish liability, Plaintiffs . . . must show that CenturyTel billed its customers for WireWatch under a misleading and ambiguous heading (a violation of § 201(b)), *and that customers nonetheless paid for WireWatch (satisfying §* 206's injury requirement). *Whether the customer authorized her enrollment in WireWatch or benefitted [sic] from the plan's service*, despite being billed for the service under a misleading description, *goes only to the issue of damages and does not preclude a finding that the typicality requirement is satisfied*. Thus, the fact that some of the class members may have enrolled in WireWatch does not make the . . . claim atypical.

App. 14a (emphasis added).

In further addressing the requirements of Rule 23(b), the Sixth Circuit determined that Plaintiffs "have raised common allegations which would allow the district court to determine *liability* for the class as a whole." (App. 22a) (emphasis added).

> Thus, Plaintiffs . . . should be able to establish liability for the class as a whole because the misleading description used by CenturyTel violated § 201(b), and class members were injured by that violation when they paid their telephone bill, which included a charge for WireWatch under a misleading description (a § 206 violation).

App. 24a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for at least two reasons. First, section 206 of the Act provides that a person who has been *injured by* a violation of the Act may recover damages. In an important question of federal law, the Sixth Circuit read out of the Act two independent elements of the statutory claim: (1) *injury* to the claimant, (2) which was *caused by* a statutory violation. The Sixth Circuit incorrectly determined that these separate statutory prerequisites to liability "go to damages." Based on its interpretation of the elements necessary to establish the requisite standing of claimants and bases of liability, the Sixth Circuit's decision affirming class certification relieved the certified class of 500,000 to 700,000 CenturyTel customers of their obligation to prove injury and causation as a predicate to proving liability and thereafter damages. The Sixth Circuit's decision omitting the required causation proofs is contrary to the express language of the Act, as well as the Court's interpretation in *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) of similar wording in the RICO statute.

Second, in eliminating the required statutory elements of injury and causation, the Sixth Circuit's opinion conflicts with the Second Circuit's opinion in *Conboy v. AT&T*, 241 F.3d 242 (2d Cir. 2001), which properly recognized the injury and causation elements of a claim under section 206.

A. The Sixth Circuit's Decision Conflicts With The Express Language Of The Communications Act And A Supreme Court Decision Interpreting Analogous Statutory Language

1. The Act Requires Both The Existence Of An Injury, *And* A Causal Connection Between The Statutory Violation And That Injury, In Order To Establish Liability

The prerequisites to a finding of liability against a common carrier such as CenturyTel are specified by section 206 of the Act, which establishes the elements[3] of a claim:

> In case any common carrier shall do . . . any act . . . declared to be unlawful . . . such common carrier shall be liable to the person or persons *injured thereby* for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter . . . .

47 U.S.C. § 206 (emphasis added). The district court determined that CenturyTel's "Non-Regulated Service" billing description was unlawful within the meaning of 47 U.S.C. § 201(b). (App. 67a). Thus, according to the plain meaning of section 206, and as applied here, CenturyTel is liable only to a person who proves that he or she has been *injured by* CenturyTel's "Non-

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[3] An examination of a class certification decision must begin with the correct enunciation of the elements of the underlying cause of action. *See Johnston v. HBO Film Mgmt, Inc.*, 265 F.3d 178, 186-87 (3d Cir. 2001).

Regulated Service" billing description. And if liability is thus established, damages sustained "in consequence of" the "Non-Regulated Service" billing description are recoverable. The Court has previously recognized that the Act authorizes "an *injured* person to recover 'damages' for an 'unlawful' charge or practice . . . ." *Global Crossing Tele. Inc. v. Metrophones Tele., Inc.*, 127 S.Ct. 1513, 1517 (2007) (emphasis added).

The Sixth Circuit, however, incorrectly ruled that where the language of CenturyTel's bill failed to describe adequately the service provided (thus establishing the "violation"), proof of payment of those charges, alone, proves Plaintiffs' legal injuries. In other words, according to the Sixth Circuit, such payment proves both injury-in-fact and the causal connection between the "Non-Regulated Service" billing description and that injury.

> To establish liability, Plaintiffs . . . must show that CenturyTel billed its customers for WireWatch under a misleading and ambiguous heading (a violation of § 201(b)), *and that customers nonetheless paid for WireWatch (satisfying § 206's injury requirement).*

App. 14a (emphasis added).

However, notwithstanding an inadequate billing description and contrary to the Sixth Circuit's ruling, any customer who desired WireWatch coverage and knowingly subscribed suffered no injury because that customer received exactly what he or she wanted and paid for – protection against repair costs. And, the

Sixth Circuit acknowledged CenturyTel's position that customers in the class generally enrolled in WireWatch via telephone calls, during which a CenturyTel customer service representative would "inform customers of the benefits and costs of WireWatch." (App. 5a). Thus, payment for WireWatch does not establish either injury or injury "caused by" CenturyTel's billing description for many of the class members. The Sixth Circuit's opinion is thus contrary to the language of the Act and is contrary to a decision of the Court interpreting analogous statutory language.[4]

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[4] The Sixth Circuit placed entire reliance for its class certification decision on an inapposite antitrust case, *In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001) (App. 14a). But *Visa* is inapplicable because in that case, unlike the present case, the plaintiffs' payments *did* prove injury under their anti-trust theory. In *Visa*, the putative class of merchants claimed that defendants Visa and MasterCard had created an illegal tying arrangement requiring those merchants who accepted defendants' credit cards also to accept their debit cards. *Visa*, 280 F.3d at 129-30. Critical to the class certification analysis in that case, evidence showed that "*all class members* have been *injured by paying higher interchange fees* for Visa Check and MasterMoney than they would have absent the tie." *Visa*, 280 F.3d at 133 (emphasis added). The Second Circuit held "that plaintiffs' *overcharge theory* would permit them to establish injury-in-fact on a class-wide basis." *Id.* at 136 (emphasis added). *In dispositive contrast to the instant case, and as specifically held by the Second Circuit, the antitrust violation in Visa caused and was inseparable from the injury.* The *Visa* court determined that the "presence of injury and causation is binary; it is either there or it is not . . . . [I]njury and causation is present for every putative class member." *Id.* at 137 (quoting *In re Visa Check / MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 86 (E.D.N.Y. 2000)). In the present case, Plaintiffs did not allege an anti-trust violation, and did not allege that CenturyTel had overcharged for

a. The Act Requires Proof Of Injury, And Mere Payment Of The WireWatch Fee Does Not Establish Injury

Section 206 provides for a common carrier's liability only to a person who has been *injured*.[5] However, by eliminating any separate inquiry into the statutory element of injury and by ruling incorrectly that any such analysis is relevant only "to the issue of damages and not liability," App. 24a, the Sixth Circuit has, in effect, established liability for all faulty billing descriptions, regardless of absence of injury. Applying the Sixth Circuit's erroneous view of the elements necessary to establish a cause of action under section 206, every WireWatch subscriber who received and paid for that service "automatically" proves injury (and causation), and thus liability.

The element of injury under the Act is of determinative import here because injury-in-fact is the *sine qua non* of Article III standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). And no putative class which contains members who lack Article III standing can ever be certified. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 612-13 (1997)

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its WireWatch service. *In re Visa* is completely inapplicable in both the facts and law.

[5] As conceded by Plaintiffs below (App. 22a), section 206 does not impose "automatic" or "strict" liability for CenturyTel's "Non-Regulated Service" billing description.

("Rule 23's requirements must be interpreted in keeping with Article III constraints . . . .").[6]

Although the Sixth Circuit acknowledged that Plaintiffs must establish that each class member was injured by CenturyTel's statutory violation, it incorrectly determined that "[t]his can be done by showing that each class member paid for WireWatch during the period when the service was billed under the misleading description." (App. 23a). Expressly confusing the distinct issues of injury and damages, the Sixth Circuit stated that although each class member "will have to show that she did not enroll in WireWatch, . . . *that is relevant, . . . to the issue of damages and not liability.*" (App. 24a) (emphasis added). "Whether the customer authorized her enrollment in WireWatch, or whether the customer would have terminated her enrollment in WireWatch if the billing description had been clearer is, as the district court concluded, an issue that goes to damages . . . ." (App. 14a).

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[6] *See also, Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("no class may be certified that contains members lacking Article III standing"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 334 (S.D.N.Y. 2003) (noting that "each member of the class must have standing with respect to injuries suffered as a result of defendants' actions . . . ."); 7AA Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1785.1, at p. 387 ("An appropriate application of standing in class suits necessitates an inquiry into whether the class members have been injured by defendant's conduct, thereby presenting a 'live' case"); 7AA Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1785.1, at p. 390 ("to avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention").

b. The Act Requires Proof Of A Causal Connection Between The Statutory Violation And The Injury

Section 206 also requires the injury to have been caused by the violation – *i.e.* CenturyTel is liable to a person "injured thereby." As applied here, CenturyTel is liable only to persons who suffered an injury that was *caused by* the "Non-Regulated Service" billing description. Just as the Sixth Circuit failed to recognize the import and application of the injury requirement, the Sixth Circuit failed to acknowledge and apply the separate, express statutory requirement that class members show that the statutory violation *caused* an alleged injury.

> Thus, Plaintiffs . . . should be able to establish liability for the class as a whole because the misleading description used by CenturyTel violated § 201(b), and class members were injured by that violation when they paid their telephone bill, which included a charge for WireWatch under a misleading description (a § 206 violation).

App. 24a.

The Act's use of the phrase "injured thereby" reflects a statutory framework requiring proof of causation. Had Congress not intended to require injury and causation as necessary elements of liability, section 206 would simply have provided that: "In case

any common carrier shall (violate this Act) . . . such common carrier *shall be liable*."[7]

In its class certification analysis, the Sixth Circuit eliminated any separate examination of the statutory requirements of injury and causation, equated a violation of the Act with liability, and proceeded directly to a damages analysis. The Sixth Circuit has thus rendered as mere surplusage the statutory words "injured thereby," despite the well established principle that "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. Commodity Futures Trading Comm.*, 519 U.S. 465, 472 (1997) (citations omitted).

In addition to the plain language of the Act, the Court has confirmed the necessity of the causation element in applying functionally identical statutory language. In *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992), the Court analyzed 18 U.S.C. § 1964(c), the RICO liability statute, which provides that: "[a]ny person injured . . . *by reason of* a violation of [RICO] . . . may sue therefor . . . and shall recover threefold the damages he sustains . . . ." 18 U.S.C. § 1964(c) (emphasis added). In *Holmes*, the Court held that the statutory language, "by reason of," requires a showing that the alleged injury was *caused by* the violation of the statute. 503 U.S. at 268; *accord Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) ("When a court evaluates a RICO claim for proximate

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[7] Compare the language of section 206, which provides: "In case any common carrier shall (violate this Act) ... such common carrier *shall be liable to the person or persons injured thereby* . . . ." (emphasis added).

causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries").

Section 206, and the Court's decision in *Holmes*, clearly require proof of causation, which here the Sixth Circuit wholly ignored in its assessment of the class certification criteria.

c. The Sixth Circuit Wrongly Equated Injury With Damages

The distinction between injury and damages is fundamental. "Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)." *Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 259 F.3d 154, 188 (3d Cir. 2001); *see also Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

In *Wit Capital Group, Inc. v. Benning*, 897 A.2d 172 (Del. 2006), the Delaware Supreme Court articulated the distinction "between the *amount of damages*, the calculation of which will not ordinarily defeat class certification, and the *fact of injury* and causation, which are liability elements . . . ." 897 A.2d at 179 (emphasis in original) (internal citation omitted).

> The fact of damages is distinct from the issue of actual damages. Fact of damages pertains to the existence of injury, as a predicate to liability; actual damages involve the quantum of injury, and relates to the appropriate measure of individual relief. Although actual damages

> typically require the courts to become involved in individual calculations of damages, this has been held to be an insufficient basis for denying class certification where the common issues relevant to liability can be established on a classwide basis. . . . Class treatment of fact of damages issues, however, presumes the ability to prove the fact of damage without becoming enmeshed in individual questions of actual damage. . . . *Where proof of fact of damages requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues, thereby rendering class certification problematic.* ("The putative class must first demonstrate economic loss on a common basis. As noted, the issue is not the calculation of damages but whether or not class members have any claims at all.")

Wit Capital, 897 A.2d at 179 (emphasis added). Recognition of the distinction between injury and damages is critical to all class certification determinations because ". . . the issue is not the calculation of damages but whether or not class members have any claims at all." *Newton v. Merrill Lynch*, 259 F.3d at 189. Absent injury, there is no standing. *Amchem*, 521 U.S. at 612-13.

2. The Sixth Circuit's Failure To Recognize And Give Effect To The Liability Requirements For A Cause Of Action Under Section 206 Resulted In An Improper Class Action Analysis And An Erroneous Certification Of A Class Of 500,000 To 700,000 Persons

By mistakenly replacing the Act's required analysis of injury and causation with its discussion of damages, the Sixth Circuit functionally *eliminated* those elements with respect to its typicality analysis under Rule 23(a) and its predominance analysis under Rule 23(b)(3). Once it had committed that fundamental error, the Sixth Circuit inevitably reached the incorrect conclusion that the instant class of 500,000 to 700,000 customers, each of whom must individually prove injury in order to state a claim (or even have standing) under the Act, could be certified.

CenturyTel argued to the Sixth Circuit that Plaintiffs could not under any circumstance or analysis meet the typicality requirement of Rule 23(a)(3) because "resolution of the named Plaintiffs' claims . . . would not prove that other members of the class were . . . injured." (App. 11a) (internal quotation omitted). The Sixth Circuit rejected that argument as unavailing, relying on the true, but legally insufficient fact that Plaintiffs' claims arise from the same billing *violation*.[8] The Sixth Circuit held that to establish liability on a class-wide "typical" basis, Plaintiffs must

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[8] Plaintiffs' claims arose from "the same allegedly deceptive billing practice that gives rise to the claims of the other class members. . . ." (App. 13a).

merely show that "CenturyTel billed its customers for WireWatch under a misleading and ambiguous heading . . . and that customers nonetheless paid for WireWatch . . . ." (App. 14a).[9] The Sixth Circuit further held, wrongly, that whether CenturyTel customers authorized enrollment in WireWatch or benefited from the plan's services goes "only to the issue of damages and does not preclude a finding that the typicality requirement is satisfied." (App. 14a).

The same error infected the Sixth Circuit's Rule 23(b)(3) analysis. In challenging the district court's certification decision, CenturyTel argued that Plaintiffs could not meet the predominance requirement of Rule 23(b)(3) because "'only those customers who can establish that they did not want or request the WireWatch service can establish CenturyTel's liability . . . .'" (App. 24a) (internal citation omitted). The Sixth Circuit again rejected CenturyTel's argument, and held that under "§ 206, CenturyTel is liable if it violated § 201(b), which makes it unlawful for CenturyTel to bill for a service under a misleading description, even where the customer requested the service." (App. 24a). Again,

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[9] The Sixth Circuit acknowledged but did not fulfill its obligation to ensure "that 'the class may only be certified if, 'after a rigorous analysis,' the . . . [Rule 23(a)] prerequisites have been met.'" (App. 10a) (*quoting inter alia, Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). The Sixth Circuit opinion is completely devoid of rigorous or *any* analysis of how – exactly or even hypothetically – CenturyTel customers who were informed "of the benefits and costs of WireWatch" (App. 5a) and who then authorized enrollment in WireWatch (App. 14a) could have been *injured by* the inadequate billing description which those customers may not even have read.

the Sixth Circuit expressly stopped short of applying the remaining elements of the Section 206 claim. That court is correct in that a *violation* has occurred "even where the customer requested the service." *Id.* But the Act requires not only a violation, but also injury and causation as a predicate to liability. The Sixth Circuit failed to give effect to the separate injury and causation components of liability.

Here, both typicality and predominance of common questions are absent. "[T]he typicality requirement is not satisfied when a plaintiff can prove his own claim but not 'necessarily have proved anybody[] else's claim.'" App. 12a (*quoting Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) and *citing In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (denying certification where "no common cause of injury.")). *See Newton v. Merrill Lynch*, 259 F.3d 154, 172 (3d Cir. 2001) ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable"). The Rule 23(b)(3) analysis serves to "'prevent[ ] the class from degenerating into a series of individual trials.'" *Bell Atlantic Corp. v. AT&T*, 339 F.3d 294, 302 (5th Cir. 2003) (internal citation omitted). Moreover, as noted above, where injury is absent, so too is standing.

Because the class includes customers who wanted and knowingly subscribed to WireWatch (as the Sixth Circuit conceded),[10] the only way to identify those class

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[10] "Whether the customer authorized her enrollment in WireWatch . . . goes only to the issue of damages. . . . Thus, *the fact that some of the class members may have enrolled in*

members to whom CenturyTel may actually be liable is to individually litigate the claims of every customer who received an inadequate bill description.

Stated another way, the Sixth Circuit held that liability arises from two facts: a faulty billing description, plus payment of the bill.[11] That analysis presupposes that *every* WireWatch customer was injured as a result of an "improper" billing description. However, CenturyTel customers who voluntarily subscribed to WireWatch because they wanted that service when it was explained to them were neither *injured* nor *caused injury* by the billing description, regardless of what it said. Those subscribers were not "injured" because (1) they made conscious, informed decisions to subscribe to WireWatch; (2) they received the service they wanted and paid the agreed-upon price for that service; and (3) neither their decision to purchase nor the price they paid were affected by the billing description (the "violation").

Further, customers who did not read the "services" portion of their bills (including the faulty billing description) were not *caused injury* by CenturyTel's billing description. Those customers were wholly unaware of what the billing description said, or even of its existence, and therefore could not have made or refrained from making any payment decision based on

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WireWatch does not make [those class members'] claim[s] atypical." (App. 14a) (emphasis added).

[11] The only allegation of injury under Count I is that WireWatch fees were paid pursuant to a billing description which violated the Act. (Complaint at ¶¶ 30-32).

that description, whatever it said. Under any of these circumstances, CenturyTel's billing description violation did not cause, and could not have caused, a cognizable injury.

An issue is subject to common, generalized proof only where its resolution will *not* entail individualized inquiries into the circumstances of each class member. If the evidence necessary to resolve an issue is likely to differ from class member to class member in a relevant manner, then the issue is individualized. *See Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) ("[t]he nature of the evidence that will suffice to resolve a question determines whether the question is common or individual").

In this case, neither injury nor liability can be proven on a class-wide basis. Many of the class members suffered no injury. Therefore, the class cannot be certified under Rule 23 because typicality and predominance of common questions are absent. The Sixth Circuit improperly confused injury and causation with damages, and thus read out of the Act any separate analysis for injury and causation. The Sixth Circuit failed to analyze the two liability elements for which individual proofs are mandated. The Sixth Circuit thus improperly affirmed the class certification decision.

B. By Equating A Statutory Violation With Damages, The Sixth Circuit's Decision Conflicts With The Second Circuit's Decision In *Conboy v. AT&T*, Which Held That Section 206 Requires Proof Of Injury

In *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001), the Second Circuit addressed a class action damages claim arising under the Act. The Second Circuit, like the Sixth Circuit in the instant case, was called upon to determine the circumstances under which liability arose under Section 206 of the Act for a "violation" of a substantive provision of the Act. In *Conboy,* the Court assumed a substantive violation[12] based on AT&T's improper disclosure of plaintiffs' private information held by AT&T. *Conboy*, 241 F.3d at 248.

The *Conboy* court held that liability could not be proven on a class-wide basis. Despite the existence of a class-wide "violation" of the Act (the improper dissemination of customer information), the *Conboy* Court recognized that individualized injury and causation issues were nevertheless presented:

> [I]t is "not reasonable to assume that every" violation [of the Act] ... "no matter what the circumstances ... *is ... likely" to cause* mental and emotional distress *[injury].* Many

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[12] Section 222(c)(1) of the Act, 47 U.S.C. § 222(c)(1), makes it a "violation" of the Act for a telecommunications carrier to improperly "use, disclose, or permit, access to individually identifiable customer ... information . . . ." *Conboy,* 241 F.3d at 248, fn 3.

> customers will not notice when their personal information is disseminated in violation of [the Act]. Moreover, those who learn of a violation may not even care.

Conboy, 241 F.3d at 251 (emphasis added, internal citations omitted).

While this analysis arose in the *Conboy* court's discussion of "presumed damages," in reaching this ruling the court nevertheless recognized, and ruled, that *payments* by the putative plaintiff class (the basis of the Sixth Circuit's liability ruling in the present case)[13] could *not* serve as the basis for their claim of actual injury because those plaintiffs (like the Plaintiffs here) received services in exchange for those payments, and thus suffered no monetary injury. The *Conboy* plaintiffs argued that:

> their monthly payments to AT&T for long-distance service contained an implicit payment for AT&T's compliance with the Telecommunications Act, and that disclosure of plaintiffs' private information [in violation of the Act] deprived them of the full value of those payments.

Conboy, 241 F.3d at 249. The Second Circuit flatly rejected that argument:

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[13] "Plaintiffs ... should be able to establish liability for the class as a whole because the misleading description used by CenturyTel violated § 201(b), and class members were *injured by that violation when they paid their telephone bill* . . . ." App. 24a (emphasis added).

> [P]laintiffs did not make monthly payments to AT&T for compliance with the Telecommunications Act; *rather, they paid AT&T for long-distance telephone service, which they received. AT&T's alleged failure to comply with the Telecommunications Act did not deprive them of the value of this service.* . . . AT&T must comply with the Telecommunications Act not because it receives monthly payments from its customers, but because it is a common carrier governed by [the Act]. Indeed, even if plaintiffs had failed to pay their regular monthly telephone bills, AT&T would still have had an obligation to comply with the provisions of the Act. Accordingly, *it cannot be argued that plaintiffs' monthly payments were, in part, consideration paid to AT&T for compliance with [the Act].*

Conboy, 241 F.3d at 250 (emphasis added).

The same rationale applies to the present Plaintiffs' billing claim. Here, the class members made payments to CenturyTel in exchange for a service – WireWatch – essentially an insurance policy against repair costs. In *Conboy* the putative class members made payments in exchange for a service – long distance telephone calls. No portion of CenturyTel customers' WireWatch payments were *in consideration for* receipt by them of a sufficient billing description.[14]

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[14] The *Conboy* decision suggests still further individualized injury: Did the customer subscribe to and pay for the *service*, or for the telecommunications carrier's *compliance* with the Act? Specifically here, did CenturyTel customers subscribe to

The Second Circuit similarly ruled that no part of those putative plaintiffs' payments were *in consideration for* AT&T's nondisclosure of protected information. *Conboy*, 241 F.3d at 250. In each case the statutory requirement existed independently of plaintiffs' payments for services received.

In *Conboy*, only those individual putative class members who could show injury caused by the disclosure violation could have established liability. *See* 47 U.S.C. § 206 and *Conboy*, 241 F.3d at 251. Such injury, for example, could have been inappropriate solicitations by other entities that improperly received individual plaintiff's personal information.

Similarly here, only those individual class members who can show injury caused by the billing violation can establish liability. That may be shown, for example, by class members who did not voluntarily subscribe to WireWatch,[15] and who would have unsubscribed if they had received and read a bill containing an adequate billing description of the WireWatch service.

WireWatch because they desired to be protected from repair costs, or because they wanted to receive a bill that adequately described that service? While the question may or may not be rhetorical, at a minimum it presents another individual fact question, and manifestly underscores the fact that Plaintiffs cannot establish common liability of CenturyTel to all class members.

[15] As noted above, few of the 500,000 to 700,000 class members in the instant class will be able to make this showing, since "historically [CenturyTel] customers have enrolled in WireWatch via oral communications with a [CenturyTel] customer service representative, such as when a customer calls to set up service. . . ." App. 5a.

In the instant case, class members who voluntarily subscribed to WireWatch are in the same position as *Conboy* plaintiffs who "didn't care" about, and therefore were not "injured by" the contested disclosures. Such CenturyTel WireWatch customers who subscribed and paid for that service received exactly what they had requested, and therefore could not have been "injured by" CenturyTel's billing statement, *regardless* of what it said. The Sixth Circuit's holding that proof of mere payment proves injury, and the Sixth Circuit's elimination of the necessity of proving causation, conflict with *Conboy*.

As discussed previously, the Sixth Circuit's disregard of the injury and causation elements, contrary to *Conboy*, inevitably resulted in the incorrect certification of a class of 500,000 to 700,000 CenturyTel customers, the great preponderance of whom (CenturyTel contends) wanted, paid for, and received the WireWatch service. *None* of those knowing subscribers were injured by CenturyTel's billing description or, for that matter, were injured *at all*. Such class fails for lack of typicality and lack of predominance of common issues.

This Court should grant the Petition to avoid enshrinement in federal jurisprudence of the Sixth Circuit's inaccurate statement and understanding of the elements of a cause of action arising under section 206 of the Act.

CONCLUSION

For all of the reasons set forth above, Petitioner CenturyTel, Inc. respectfully requests issuance of a

writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: September 26, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-1565

[Filed December 18, 2007]

BARBRASUE BEATTIE and JAMES SOVIS,
Plaintiffs-Appellees,

v.

CENTURYTEL, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan at Bay City. No. 02-10277—David M. Lawson, District Judge.

Argued: September 18, 2007

Decided and Filed: December 18, 2007

Before: COLE and COOK, Circuit Judges; FROST, District Judge.*

COUNSEL

ARGUED: David J. Houston, DICKINSON WRIGHT, Lansing, Michigan, for Appellant. Elwood S. Simon, ELWOOD S. SIMON & ASSOCIATES, Birmingham, Michigan, for Appellees. **ON BRIEF:** David J. Houston, Jeffery V. Stuckey, Scott R. Knapp, DICKINSON WRIGHT, Lansing, Michigan, for Appellant. Elwood S. Simon, ELWOOD S. SIMON & ASSOCIATES, Birmingham, Michigan, for Appellees.

OPINION

R. GUY COLE, JR., Circuit Judge. Plaintiffs-Appellees brought this suit in federal district court, alleging that Defendant-Appellant CenturyTel, Inc. ("CenturyTel") violated federal and state law by using deceptive billing practices to bill customers for WireWatch, a wire maintenance program. Plaintiffs-Appellees brought suit under the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, the Federal Communications Commission's Truth-in-Billing Act, 47 C.F.R. § 64.2400 *et seq.*, and the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq*. Plaintiffs-Appellees moved the district court for class certification and for judgment on the pleadings on Count I of the Complaint, which alleged that CenturyTel engaged in unjust and

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* The Honorable Gregory L. Frost, United States District Judge for the Southern District of Ohio, sitting by designation.

unreasonable billing practices in violation of 47 U.S.C. § 201(b) and 47 C.F.R. § 64.2401. The district court certified Plaintiffs-Appellees' claims and granted Plaintiffs-Appellees judgment on the pleadings as to Count I. CenturyTel appeals only the district court's decision to certify the class. For the reasons discussed below, we **AFFIRM** the district court's order to certify the Plaintiffs-Appellees' class on its federal-law claims under Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). We further remand the state-law claims to the district court to conduct a Rule 23 analysis.

I.

A. Factual Background

CenturyTel is a telecommunications service provider. As the eighth largest telephone company in the United States, CenturyTel provides telephone services to more than 1.7 million customers in twenty-two states, including Michigan. CenturyTel offers its customers a service entitled "WireWatch," an "inside wire maintenance plan," described by the company as follows:

> WireWatch covers the cost of diagnosis and repair of inside wiring and/or jack damages that can interrupt your phone service. Once your telephone wiring enters your house, it becomes your responsibility to maintain it and typical repairs can be costly. For a low monthly fee, enjoy the convenience and satisfaction of having

> a certified CenturyTel Tech to diagnose and make any necessary repairs.

(JA 17; Compl. ¶ 19.)

WireWatch is an unregulated service, and therefore is not covered by CenturyTel's tariffs or rate filings. (JA 17; Compl. ¶ 20.) CenturyTel does not require its customers to subscribe to WireWatch as a condition to obtaining or keeping the company's "tariffed telephone and transmission services." (*Id.*) As the district court pointed out, WireWatch varies from state to state: "In some states, CenturyTel has offered WireWatch for a number of years, but in others, such as Alabama and Missouri, WireWatch only recently has become available through CenturyTel to its customers." *Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160, 163 (E.D. Mich. 2006).

Plaintiffs-Appellees allege that CenturyTel began billing customers for WireWatch as early as 1994. (JA 18; Compl. ¶ 22.) From 1994 until 2001, the price of WireWatch gradually increased, starting from as little as $0.50 per month in 1994, increasing to $0.99 per month in 1999, and capping off at $3.95 per month in 2001. (JA 19; Compl. ¶ 23.) Until January 2002, CenturyTel billed customers for WireWatch using the description "Non-Regulated Services" under a section of its bill titled "Monthly Service Detail." (JA 18-19; Compl ¶ 22-23.) In or around January 2002, CenturyTel reorganized its telephone bills, changing the description used to bill customers for WireWatch from "Non-Regulated Services" to "Inside Wire Maintenance Plan." (JA 19; Compl. ¶ 24.) CenturyTel also changed the heading under which it billed for

WireWatch to reflect "that these charges were for 'Other Services or Equipment,' and not for transmission services." (*Id.*) It was this change, the Plaintiffs-Appellees allege, which triggered complaints from customers who were unaware that they were being billed for WireWatch. (Appellee's Br. 11; JA 19; Compl. ¶ 25 ("Numerous customer complaints have been lodged against CenturyTel since January 2002, when CenturyTel first revealed that . . . it had been systematically billing and charging customers for . . . [WireWatch].").)

CenturyTel explains that historically customers have enrolled in WireWatch via oral communications with a customer service representative, such as when a customer calls to set up service, or to add or change their existing service. (Appellant's Br. 8.) According to CenturyTel, it is during these calls that a CenturyTel representative will inform customers of the benefits and costs of WireWatch. (*Id.*) CenturyTel maintains that it "does not utilize a script with regard to these oral communications concerning WireWatch." (*Id.*)

Plaintiffs-Appellees, however, allege that "CenturyTel has routinely and systematically charged customers for its optional inside wire maintenance program by 'cramming' charges onto customers' telephone bills." (JA 17-18; Compl. ¶ 20.) The Federal Communications Commission ("FCC") defines cramming as "the practice of placing unauthorized, misleading, or deceptive charges on [a customer's] telephone bill. Entities that fraudulently cram people appear to rely largely on confusing telephone bills in order to mislead consumers into paying for services

that they did not authorize or receive." (JA 12; Compl. ¶ 2.) The complaint alleges that "[w]hile CenturyTel has never provided Plaintiffs or other customers with an application form or other materials describing the supposed terms and obligations of CenturyTel's inside wire maintenance program, CenturyTel has continuously billed customers for this service each month for at least the last several years." (*Id.*)

B. Procedural History

The named Plaintiffs are two individual, residential customers of CenturyTel, each of whom reside in Michigan. (JA 13-14; Compl. ¶ 8.) The complaint alleges that plaintiff Barbrasue Beattie paid for WireWatch, unbeknownst to her, from November 1996 until January 2002, when CenturyTel's change to its billing statements alerted Beattie to this unauthorized charge. (*Id.*) Beattie contacted CenturyTel and asked for a refund of the charges. (*Id.*) Although CenturyTel admitted, in a March 29, 2002 letter, that no authorization for WireWatch was on file for Beattie's account, the company refused to credit Beattie for the charges paid prior to May 2001. (*Id.*) Like Beattie, plaintiff James Sovis unknowingly paid for WireWatch from 1994 until January 2002. (JA 14; Compl. ¶ 9.)

On October 28, 2002, Plaintiff-Appellees brought suit in federal district court, pleading six counts: (1) CenturyTel engaged in misleading or deceptive billing practices in violation of 47 U.S.C. §§ 201(b), 206, and 207 (Count I); (2) CenturyTel's unjust and unreasonable practices constitute cramming in violation of 47 U.S.C. §§ 201(b), 206, and 207 (Count II); (3) Under 47 U.S.C. § 401, Plaintiffs-Appellees seek

(a) a declaratory judgment that CenturyTel violated 47 U.S.C. § 201(b) and the FCC's Truth-in-Billing Act, 47 C.F.R. § 64.2401, and (b) an injunction barring CenturyTel from continuing to violate these laws and regulations (Count III); (4) CenturyTel breached its contract with Plaintiffs-Appellees and breached its corresponding duties of good faith and fair dealing by engaging in unjust and deceptive billing and cramming practices in violation of state law (Count IV); (5) CenturyTel's unlawful, unconscionable, and deceptive practices have led to its unjust enrichment, and the company should be forced to disgorge any of the charges, monies, and fees that it derived from its unlawful and deceptive billing practices (Count V); and (6) CenturyTel's unlawful billing practices violated the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq.* (Count VI). (JA 21-26; Compl. ¶ 29-49.)

Plaintiffs-Appellees brought this action on behalf of themselves and a putative class under Rule 23 of the Federal Rules of Civil Procedure. The parameters of the class were defined as follows:

> [A]ll persons who have paid CenturyTel, Inc. for charges described in CenturyTel's residential telephone bills as "Non-Regulated Services" or "Inside Wire Maint. Plan" during the fullest period allowed by law (the "Class").
>
> Excluded from the Class are CenturyTel; its subsidiaries, affiliates, officers and directors; any entity in which CenturyTel has a controlling interest; and the legal

representatives, heirs, successors and assigns of any such excluded party.

(JA 15; Compl. ¶ 11.) On August 15, 2003, Plaintiffs-Appellees moved to certify the class. Plaintiffs-Appellees also moved for judgment on the pleadings as to Count I of their complaint under Federal Rule of Civil Procedure 12(c). On March 10, 2006, the district court certified the class, concluding that the Plaintiffs-Appellees had "satisfied all the prerequisites under Rule 23(a)," *Beattie*, 234 F.R.D. at 169, and had "satisfied the requirements for certification . . . under Rule 23(b)(3)." *Id.* at 171. The district court also granted the Plaintiffs-Appellees' motion for judgment on the pleadings as to Count I. *Id.* at 173 ("Based on the allegations and admissions in the pleadings, the Court concludes that the defendant's practice of billing for its WireWatch program using the description 'Non-regulated Services' constitutes a violation of section 201(b) of the Telecommunications Act as a matter of law.").

CenturyTel filed this timely appeal.

II.

A. Standard of Review

This Court permits interlocutory appeals of a district court's order to certify a class, Fed. R. Civ. P. 23(f), and reviews such orders for an abuse of discretion, *Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003). "The district court maintains substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control

its own pending litigation." *Reeb v. Ohio Dep't of Rehab. and Corr.*, 435 F.3d 639, 643 (6th Cir. 2006) (citing *Stout v. J.D. Byrider*, 228 F.3d 709, 716 (6th Cir. 2000)); *but see Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc) (explaining that "a district court may not certify any class without 'rigorous analysis' of the requirements of Rule 23"). "The district court's decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion." *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004) (internal quotation marks omitted). A district court abuses its discretion "when [it] relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Reeb*, 435 F.3d at 644.

B. Merits

1. *Class Certification*

It is the plaintiff's burden "to establish his right" to class certification. *Alkire*, 330 F.3d at 820 (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976)). Under Federal Rule of Civil Procedure 23(a), there are four prerequisites to a class action:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will

> fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In *Alkire*, this Court explained that "the class may only be certified if, 'after a rigorous analysis,' the district court is satisfied that these prerequisites have been met." 330 F.3d at 820 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)).

In addition to the prerequisites of Rule 23(a), a plaintiff must also show that her suit falls within one of the three types of class actions under Federal Rule of Civil Procedure 23(b). Here, the Plaintiffs-Appellees sought, and the district court granted, class certification under Rule 23(b)(3), which requires the district court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Lastly, Rule 23 does not require a district court, in deciding whether to certify a class, to inquire into the merits of the plaintiff's suit. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006).

2. *Rule 23(a)*

(a) *Rule 23(a)(3): Typicality*

CenturyTel challenges the district court's conclusion that the Plaintiffs-Appellees have satisfied the typicality requirement of Rule 23(a)(3) because "the resolution of the named Plaintiffs' claims depends upon facts unique to them, and would not prove that other members of the class were misled, crammed or injured." (Appellant's Br. 52.) Conversely, Plaintiffs-Appellees contend that the typicality requirement is satisfied here because "the claims of Plaintiffs and all Class members arise from the same practice (unlawful billing), that affected them in the same manner (all received and paid bills that unlawfully described the Plan as 'Non-Regulated Service'), and are based on the same legal theory (violation of 47 U.S.C. § 201(b) and 47 C.F.R. § 64.2401)." (Appellee's Br. 55.)

The district court concluded that the typicality requirement was satisfied, explaining that the key issue is "whether the billing language cited by the plaintiffs satisfies the requirements of the statute and regulation." *Beattie*, 234 F.R.D. at 169. The court explained that CenturyTel's argument, "that a myriad of legal and factual issues exist between the class representative and the putative class members," "confounds the matters of liability and damages." *Id.*

Under Rule 23(a)(3), "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A claim is typical if "it arises from the same event or

practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). In *Sprague*, the Court explained that "[t]ypicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." 133 F.3d at 399 (citing *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082). On the other hand, the *Sprague* Court explained, the typicality requirement is not satisfied when a plaintiff can prove his own claim but not "necessarily have proved anybody's else's claim." *Id.* Lastly, for the district court to conclude that the typicality requirement is satisfied, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 n.31 (6th Cir. 1976).

In *Daffin*, for instance, this Court concluded that the typicality requirement was satisfied because the plaintiff's claim–"that Ford breached its express warranty by providing vehicles with defectively designed throttle body assemblies"–involved "the same defective throttle body assembly as the other class members." 458 F.3d at 552. The Court found the lead plaintiffs' claims to be typical "despite the different factual circumstances regarding the manifestation of the accelerator sticking and Ford's attempts to remedy manifested sticking." *Id.* at 553 (noting that "[t]he mere fact that Daffin's throttle assembly stuck, while other class members' throttles have not stuck, does not render Daffin atypical"). Although Ford argued that

"an owner who has not experienced accelerator sticking and has not sought repair for the problem cannot 'prove' an express warranty claim," this Court explained that a district court should not inquire into the merits of the suit in assessing typicality. *Id.* Similarly, the Plaintiffs-Appellees' claim that CenturyTel violated §§ 201 and 206 by billing for WireWatch under a misleading description is typical of the claims of the class members. The mere fact that some class members may have enrolled in WireWatch after receiving a billing statement with the misleading description does not make the Plaintiffs-Appellees' claims atypical.

Plaintiffs-Appellees' claims arise from the same allegedly deceptive billing practice that gives rise to the claims of the other class members, namely, CenturyTel's practice of billing for WireWatch under a misleading description. Here, Plaintiffs-Appellees allege that CenturyTel violated § 201(b) because it billed customers for WireWatch under the description "Non-Regulated Services," which is inherently ambiguous and misleading, and therefore unjust and unreasonable under the statute. This is the same allegation any other class member would bring against CenturyTel, and therefore resolution of CenturyTel's liability under § 201(b) with regards to Plaintiffs-Appellees' claim will also resolve the company's liability as to claims brought by other class members. *See Sprague*, 133 F.3d at 399 (explaining that the typicality requirement is satisfied if "as goes the claim of the named plaintiff, so go the claims of the class").

Further, CenturyTel's argument that individual issues of liability predominate over common issues, and thereby preclude a finding of typicality, is unavailing. Whether the customer authorized her enrollment in WireWatch, or whether the customer would have terminated her enrollment in WireWatch if the billing description had been clearer is, as the district court concluded, an issue that goes to damages and can thereby be resolved through resort to subclasses. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (explaining that "[t]here are a number of management tools available to a district court to address any individualized damages issues," such as "bifurcating liability and damage trials," or "appointing a magistrate judge or special master to preside over individual damages proceedings"). To establish liability, Plaintiffs-Appellees must show that CenturyTel billed its customers for WireWatch under a misleading and ambiguous heading (a violation of § 201(b)), and that customers nonetheless paid for WireWatch (satisfying § 206's injury requirement). Whether the customer authorized her enrollment in WireWatch or benefitted from the plan's service, despite being billed for the service under a misleading description, goes only to the issue of damages and does not preclude a finding that the typicality requirement is satisfied. Thus, the fact that some of the class members may have enrolled in WireWatch does not make the Plaintiffs-Appellees' claim atypical. *Cf. Spicer v. Chicago Bd. Options Exch., Inc.*, No. CV 88-0905, 1990 WL 16983, at *6 (N.D. Ill. Jan. 31, 1990) (concluding that "the fact differences relating to the price at which each series traded do not undermine typicality, since plaintiffs' legal allegations and most

of their general fact allegations are the same for the representatives and all other members of the class").

(b) *Rule 23(a)(4): Adequacy*

CenturyTel also challenges the district court's conclusion that the adequacy requirement of Rule 23(a)(4) is satisfied. CenturyTel maintains that Plaintiffs-Appellees were required to introduce evidence showing how each class member enrolled in WireWatch to establish substantial uniformity, and because Plaintiffs-Appellees failed to do so, they cannot adequately represent the class members. (Appellant's Br. 55-56.) The district court rejected CenturyTel's argument and concluded that the adequacy requirement of Rule 23(a)(4) was satisfied. *Beattie*, 234 F.R.D. at 169. The court explained that "[t]he interests in this case, while of varying degrees, seem to all focus in the same direction." *Id.*

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (internal quotation marks and citations omitted). In *Stout*, this Court explained that it "reviews the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." 228 F.3d at 717; *see also In re Am. Med. Sys., Inc.*, 75 F.3d at 1083 (explaining that "1) the

representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel") (citations omitted).

Based on this standard, the district court did not err in concluding that the adequacy requirement of Rule 23(a)(4) was satisfied. The court stated that "plaintiffs' attorney is an experienced practitioner in this area" because of the "numerous class action cases in which counsel has participated," and CenturyTel did not argue otherwise. *Beattie*, 234 F.R.D. at 169. Further, the district court determined that the interests of the named plaintiffs were not antagonistic to those of the class members. *Id.* The facts support the district court's conclusion, because there is no indication of a conflict of interest between the named plaintiffs and the class members. *See Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, __ F.3d __, 2007 WL 2239208, at *7 (noting that "adequacy of representation turns in part on . . . absence of conflicts of interest") (internal quotation marks and citations omitted). The Plaintiffs-Appellees and the class members suffered the same injury—all were billed for WireWatch under a misleading description—and, therefore, there is every reason to believe that the Plaintiffs-Appellees will vigorously prosecute the interests of the class. *Id.* ("Class representatives are adequate when it appear[s] that [they] will vigorously prosecute the interests of the class through qualified counsel, which usually will be the case if the representatives are part of the class and possess the same interest and suffer the same injury as the class

members.") (alterations in original; citations and internal quotation marks omitted). Taken together, these factors indicate that the district court did not abuse its discretion in concluding that the adequacy-of-representation requirement of Rule 23(a)(4) is satisfied.

3. *Rule 23(b)*

The district court also held that the requirements of Rule 23(b)(3) were satisfied. *Beattie*, 234 F.R.D. at 169-171. In concluding that common questions predominate over questions affecting individual class members, the district court determined that

> [a]lthough damages may be individualized and not all customers who received ambiguous bills will say that they did not order or authorize the inside wire maintenance insurance program, the overarching question of whether the billing itself violates section 201(b) or Rule 64.2401 predominates and must be determined before any customer has a right to recover under that theory.

Id. at 170. In response to CenturyTel's argument that "the need to prove causation for each plaintiff to show liability demonstrates that individual issues predominate," the district court stated that "the necessity of each plaintiff proving the amount of his or her damages is generally not an impediment to class certification." *Id.* The court explained that

> the questions of causation and damages in this case can be addressed later in the proceedings

> by means of a special master, representative trials, or other means. However, because the liability issue predominates, this case falls easily into the category of "cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."

Id. at 171 (quoting *Windsor*, 521 U.S. at 615).

CenturyTel maintains that each class member must establish injury to prove liability under §§ 201 and 206, and "fact of injury is *not* a common issue among class members." (Appellant's Br. 21.) According to CenturyTel, the district court confounded the need of each class member to establish injury with the need to establish damages. (*Id.*) CenturyTel contends that causation and injury, unlike damages, must be established on a class-wide basis. (*Id.* 24)

(a) *Predominance Requirement*

A class action may be maintained only if it qualifies under one of the subsections of Rule 23(b) of the Federal Rules of Civil Procedure. *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728 n.12 (6th Cir. 2004). Under Rule 23(b)(3), a class action is appropriate where

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is

> superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Windsor*, 521 U.S. at 632; *see also In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001). To satisfy the predominance requirement in Rule 23(b)(3), "a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.'" *In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d at 136 (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000) (internal quotation marks omitted)). Further, "the fact that a defense 'may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.'" *Id.* at 138 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000)). Lastly, "[c]ommon issues may predominate when liability can be

determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 139.

Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b). Section 206 establishes that a common carrier is liable for conduct that violates section 201(b):

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206. Section 207 authorizes individuals injured by a common carrier's actions to bring suit:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under

> the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207.

The FCC also enacted a regulation intended to clarify the meaning of § 201(b):

> Descriptions of billed charges. Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered. The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged.

47 C.F.R. § 64.2401(b). Further, in its report issued during the rulemaking process that led to the enactment of § 64.2401(b), the FCC explained:

> We contemplate that sufficient descriptions will convey enough information to enable a customer reasonably to identify and to understand the service for which the customer is being charged. Conversely, descriptions that convey ambiguous or vague information, such as, for example, charges identified as "miscellaneous," would not conform to our guideline. *Similarly, in our*

> *view, a charge described by what it is not, such as, for example,"service not regulated by the Public Service Commission" is inherently ambiguous and does not disclose sufficient information.* There is no way for a consumer to discern from this description that the charge refers to, for example, inside wiring maintenance insurance.

In the Matter of Truth-In-Billing and Billing Format, 14 F.C.C.R. 7492, at 7517-18 (Apr. 15, 1999) (internal footnotes omitted) (emphasis added). As the district court noted, "[t]he language chosen by the defendant to describe its optional inside wire maintenance service closely tracks the phrasiology criticized by the FCC as 'inherently ambiguous,' specifically as it might be applied to describe the very service at issue in this case." *Beattie*, 234 F.R.D. at 166.

Plaintiffs-Appellees conceded before the district court that § 201 is not a strict-liability statute and therefore they must establish "some type of injury" to allege a claim under §§ 201 and 206. *Id.* at 170. Contrary to CenturyTel's argument, however, Plaintiffs-Appellees have raised common allegations which would allow the district court to determine liability for the class as a whole. First, Plaintiffs-Appellees allege that CenturyTel billed for WireWatch under the misleading description, "Non-Regulated Services," in violation of § 201(b). (JA 18; Compl. ¶ 22.) The district court noted that "[t]he defendant's custom of charging for its optional inside wire maintenance insurance under the heading 'non-regulated services' gives no hint at the services for which charges are assessed." *Beattie*, 234 F.R.D. at

172 (stating that the WireWatch description "does not satisfy the FCC's truth-in-billing requirement and constitutes an unreasonable practice within the meaning of section 201(b)"). As the FCC made clear in its regulation, § 201(b) is violated when the description for a billed service is not "sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received . . . ." 47 C.F.R. § 64.2401(b). Further, the FCC's report specifically states that "a charge described by what it is not, such as, for example,'service not regulated by the Public Service Commission' is inherently ambiguous and does not disclose sufficient information." *In the Matter of Truth-In-Billing and Billing Format*, 14 F.C.C.R. 7492, at 7517-18 (Apr. 15, 1999) (internal footnotes omitted). Thus, Plaintiffs-Appellees have set forth sufficient allegations to show that CenturyTel's billing practice violated § 201(b), because the description used by CenturyTel is virtually identical to the misleading description the FCC condemned in its regulation and report.

Second, under § 206, Plaintiffs-Appellees must establish that each class member was injured by CenturyTel's violation of § 201(b). 47 U.S.C. § 206 (stating that a "common carrier shall be liable to the person or persons injured" by its unlawful practice). This can be done by showing that each class member paid for WireWatch during the period when the service was billed under the misleading description. Before the district court, CenturyTel admitted that "it did send some bills to customers that contained this language," *Beattie*, 234 F.R.D. at 173, and an

inventory of CenturyTel's billing records could disclose which customers paid their bills in full, which would include a payment for fees associated with WireWatch. On appeal, CenturyTel argues that "only those customers who can establish that they did not want or request the WireWatch service can establish CenturyTel's liability . . . ." (Appellant's Br. 40.)

CenturyTel is incorrect. Under § 206, CenturyTel is liable if it violated § 201(b), which makes it unlawful for CenturyTel to bill for a service under a misleading description, even where the customer requested the service. *See* 47 C.F.R. § 64.2401(b) ("The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received . . . ."). True, each class member will have to show that she did not enroll in WireWatch, but that is relevant, as the district court concluded, to the issue of damages and not liability. Thus, Plaintiffs-Appellees should be able to establish liability for the class as a whole because the misleading description used by CenturyTel violated § 201(b), and class members were injured by that violation when they paid their telephone bill, which included a charge for WireWatch under a misleading description (a § 206 violation).

(b) *Superiority Requirement*

The district court also addressed the superiority requirement of Rule 23(b)(3). The court noted that the amount of a single class member's potential recovery was small, making class resolution superior to other methods of adjudicating the controversy. *Beattie*, 234

F.R.D. at 171. In concluding that the Plaintiffs-Appellees satisfied the requirements of Rule 23(b)(3), the district court explained that "the potential recovery by an individual is relatively small, the liability issue predominates, the issues of management can be addressed by various procedural mechanisms and careful definition of subclasses, and the likelihood of an individual class member preferring to take control of the litigation is remote." *Id.*

One factor to consider in determining whether the superiority requirement of Rule 23(b)(3) is satisfied are "the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3). In *Windsor*, the Supreme Court explained that litigation should be brought as a class action if individual suits would yield small recoveries. The Court stated that "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Here, individual suits would yield only a small amount of damages, because the most each class member would have paid for WireWatch between 1994 and 2001 is roughly $124.68.[1] Such a small possible

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[1] This amount was calculated based on Plaintiffs-Appellees' allegation that CenturyTel charged $0.50 per month for WireWatch in 1994, $0.99 per month between 1995 and 2000, and $3.95 per month in 2001. (JA 19; Compl. ¶ 23.) Assuming that a customer was billed twelve times a year, WireWatch fees would

recovery would not encourage individuals to bring suit, thereby making a class action a superior mechanism for adjudicating this dispute. *See id.* ("'A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (quoting *Mace*, 109 F.3d at 344); *see also Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005) (same). Thus, the district court did not err in holding that the superiority requirement of Rule 23(b)(3) is satisfied.

4. *Plaintiffs-Appellees' State Law Claims*

Lastly, we briefly address CenturyTel's contention that the district court erred in certifying Plaintiffs-Appellees' state-law claims (Counts IV and V). CenturyTel argues that the district court's decision failed to analyze whether Plaintiffs-Appellees' state-law claims met the Rule 23 requirements, and, alternatively, Plaintiffs-Appellees' state-law claims are not appropriate for class certification because individual issues overwhelm any common issues. (Appellant's Br. 44-45.) Conversely, Plaintiffs-Appellees point out that the district court's class-certification decision "purposely did not address the state law claims." (Appellee's Br. 46.)

A review of the district court's decision leaves some ambiguity as to how that court intended to proceed with Plaintiffs-Appellees' state-law claims. In an order

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have been approximately $6 for 1994, $11.88 each year between 1995 and 2000, and $47.40 in 2001.

dated May 29, 2003, the district judge presiding over the case stated that, "[a]fter further discussion with the parties, the [c]ourt finds that the parties should first focus on the merit of the plaintiffs' federal claims and the propriety of class certification concerning those claims." (JA 76.) Plaintiffs-Appellees urge us to construe this language as binding rather than merely hortatory: in their estimation, this language makes clear that their state-law claims were not pending before the district court in its certification decision and therefore are not currently pending before us on appeal.

On the other hand, Plaintiffs-Appellees' August 15, 2003 motion for class certification, which was filed after the May 29, 2003 order, requested certification that included the state-law claims. The district court's opinion granting class certification expressly references state-law theories and specifically lists Plaintiffs-Appellees' state-law claims by count. The opinion also grants the motion for certification without qualification exempting the state-law claims. Moreover, the district court's instruction to "first focus on . . . plaintiffs' federal claims" is ambiguous. The court may have meant that it planned to deal with the certification of state-law issues in a separate proceeding at a later time, or it may have meant that, within the same proceeding, it first planned to deal with the federal-law issues and then move on to the state-law matters. Given this uncertainty and the fact that the district court's certification analysis does not account for Plaintiffs-Appellees' state-law claims, a remand is appropriate for the district court to apply the Rule 23 criteria to the state-law claims.

III.

CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's judgment certifying Plaintiffs-Appellees' class as to Plaintiffs-Appellees' federal-law claims in Count I and **REMAND** Plaintiffs-Appellees' state-law claims to the district court to conduct a certification analysis of such claims consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-1565

[Filed December 18, 2007]

BARBRASUE BEATTIE and JAMES SOVIS, Plaintiffs-Appellees,	)
v.	)
CENTURYTEL, INC., Defendant-Appellant.	)

Before: COLE and COOK, Circuit Judges; FROST, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Bay City.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY THE ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX B

No. 06-0105

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 2, 2006]

In re: CENTURYTEL, INC.,	)
	)
Petitioner.	)
	)

ORDER

Before: KENNEDY, GUY, and COLE, Circuit Judges.

The defendant petitions for permission to take an interlocutory appeal of a class certification order pursuant to Fed. R. Civ. P. 23(f). The plaintiffs oppose the petition. The defendant also moves for leave to file a reply memoranda in support of its petition and has submitted a reply to the plaintiff's opposition. We will grant the motion for leave to file a reply.

Fed. R. Civ. P. 23(f) authorizes the courts of appeals to hear interlocutory appeals of class certification rulings. *See In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002), *cert. denied*, 539 U.S. 904 (2003). In considering a Rule 23(f) petition, the court "eschew[s] any hard-

and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor or against an interlocutory appeal." *In re Delta Air Lines*, 310 F.3d at 959. However, the following factors support the acceptance of a Rule 23(f) interlocutory appeal: 1) if the class certification ruling is the death knell of the litigation; 2) if the appeal raises a novel or unsettled question; 3) if the petitioner has a likelihood of success on the merits of the appeal; and 4) if the posture of the case below supports an immediate appeal. *Id.*

Upon consideration of these factors, we conclude that interlocutory review of the class certification order in this case is warranted. Therefore, the defendant's motion for leave to file a reply and its petition for permission to appeal are **GRANTED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By /s/ Sue Burlage
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case Number 02-10277-BC

[Filed March 10, 2006]

BARBRASUE BEATTIE and JAMES SOVIS, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CENTURYTEL, INCORPORATED,

Defendant.

OPINION AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION AND PARTIAL JUDGMENT ON THE PLEADINGS, AND DENYING PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES

The plaintiffs, Barbara Sue Beattie and Jim Sovis, have filed a putative class action against their

telephone service provider under certain provisions of the Federal Telecommunications Act, 47 U.S.C. 201 *et seq.*, and regulations enacted thereunder, as well as various state law theories, challenging the practice used by the defendant for billing for inside wire maintenance insurance and for charging for such optional service when it was not ordered. The case presently is before the Court on motions by the plaintiffs for class certification, for judgment on the pleadings, and to strike certain affirmative defenses. Sixth Circuit precedent suggests that claims of fraudulent billing practices by telecommunications companies fall within the primary jurisdiction of the Federal Communications Commission, and the question whether the federal claims in this case ought to be transferred to that agency is a close one. However, the Court finds that the purposes of the primary jurisdiction doctrine will not be advanced by a transfer, jurisdiction lies in this Court, the plaintiffs have satisfied the requisites for class certification, and defendant's acknowledged billing practice violated the Federal Telecommunications Act as a matter of law. The Court, therefore, will grant the motion for class certification, grant the plaintiffs' motion for partial judgment on the pleadings, and deny the motion to strike affirmative defenses.

I.

According to the parties, defendant CenturyTel is the eighth largest telephone company in the United States and currently provides telephone, internet access, long distance, and high-speed data services to more than 1.7 million customers in 22 states. As part of its services, the defendant also offers an

unregulated inside wire maintenance service program called "WireWatch." CenturyTel describes the program in its promotional literature as follows:

> WireWatch covers the cost of diagnosis and repair of inside wiring and/or jack damages that can interrupt your phone service. Once your telephone wiring enters your house, it becomes your responsibility to maintain it and typical repairs can be costly. For a low monthly fee, enjoy the convenience and satisfaction of having a certified CenturyTel Tech to diagnose and make any necessary repairs.

Compl. at ¶ 19; Ans. at ¶ 19.

This plan is an unregulated service not covered by CenturyTel's tariffs or rate filings. In some states, CenturyTel has offered WireWatch for a number of years, but in others, such as Alabama and Missouri, WireWatch only recently has become available through CenturyTel to its customers. The main reason for this variance is the manner in which CenturyTel has grown through acquisition of other telephone companies.

The state-by-state network of CenturyTel telephone service providers is an amalgamation of small companies acquired by CenturyTel over time. As a consequence, the services offered to current customers of CenturyTel historically has differed from state to state, and sometimes varied in regions within a single state. Billing formats varied widely as well. According to CenturyTel, the defendant acquired access lines and customers in Missouri from GTE (now Verizon) in

September 2000 and 2002; and in Alabama from Verizon in July 2002. The defendant purchased properties in Arkansas and Wisconsin in the late summer/early fall of 2000. When the defendant purchased Pacific Telecommunications, Inc. in 1997, it obtained customers in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, New Mexico, Oregon, Washington, and Wisconsin.

The complaint alleges that beginning in at least 1994, and perhaps before that time, defendant CenturyTel has been billing customers for the maintenance of internal wiring at a rate of $.50 to $.99, and that the rate increased to $3.95 in or about May 2001. Up through approximately January of 2002, CenturyTel labeled this charge as one for "Non-Regulated Services." At that time, it reorganized its telephone bills and re-labeled the charge to "Inside Wire Maintenance Plan." The complaint alleges that this is the first time CenturyTel customers were given any indication that this charge had all along been for an optional wire protection program. The plaintiffs describe this procedure as a form of "cramming," a term used by the Federal Communications Commission ("FCC") to refer to the practice of placing unauthorized, misleading, or deceptive charges on customer phone bills.

Plaintiff Barbrasue Beattie resides in Chesaning, Michigan and has been a customer of CenturyTel since at least November of 1996. Beattie's telephone bills from November 1996 through May 2001 contained the above-described charge for "Non-Regulated Services," which Beattie paid. She also paid a monthly charge of $3.95 from May 2001 through January 2002 when the

label for the maintenance program was changed. At that time, Beattie contacted CenturyTel to complain about the charge and to seek a refund of charges dating back to 1996. CenturyTel responded with a letter that acknowledged Beattie had never signed up for the optional service, but refused to credit her account for charges before May 2001.

Plaintiff James Sovis resides in New Lothrop, Michigan, and has been a residential telephone customer of CenturyTel since at least 1994. Like Ms. Beattie, Sovis paid for "Non-Regulated Services" through January 2002.

The complaint seeks certification of the following nationwide class, spanning approximately 1.8 million access lines in twenty-two states:

> All persons who have paid CenturyTel, Inc. for charges described in CenturyTel's residential telephone bills as "Non-Regulated Services" or "Inside Wire Maint. Plan" during the fullest period allowed by law.

Compl. at ¶ 11. Excluded from the proposed class are CenturyTel, its employees and subsidiaries, and the successors and representatives of any excluded party.

The plaintiffs' suit alleges that the defendant intentionally mislabeled the wire service program and by keeping the charge relatively small reaped substantial rewards for what amounts to a deceptive billing practice under the Federal Communications Act, 47 U.S.C. § 201(b), and under the Truth-in-Billing regulations. They also claim that the defendant's

practices caused it to breach its contracts with customers, resulted in unjust enrichment to the defendant, and the defendant's practices violate numerous provisions of the Michigan Consumer Protection Act.

The plaintiffs' complaint pleads six counts: Count 1 alleges that the defendant's billing actions violate 47 U.S.C. §§ 201(b), 206, and 207, as well as the FCC's Truth-in-Billing regulation, 12 C.F.R. § 64.2401; Count 2 claims that the defendant's activities constitute "cramming" contrary to these same statutes and rules; Count 3 seeks declaratory and injunctive relief pursuant to 47 U.S.C. § 401 for a declaration that the defendant violated 47 U.S.C. § 201(b) and 12 C.F.R. § 64.2401, and to enjoin the defendant from continuing to violate these laws and regulations; Count 4 alleges breach of contract and the duty of good faith and fair dealing with existing customers in relation to billing for telephone services in violation of state law; Count 5 raises a claim for unjust enrichment and disgorgement by the defendant for any profits it gained from deceptive billing practices; and Count 6 challenges the defendant's billing practices under the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq.*

The defendant previously moved to dismiss the plaintiffs' complaint on February 24, 2003; within that motion the defendant also requested that the Court apply the doctrine of primary jurisdiction to the plaintiffs' fourth (breach of contract and breach of the duty of good faith and fair dealing) and fifth (unjust enrichment and disgorgement) claims since the doctrine required that specific deference be given to

the Michigan Public Service Commission. The plaintiffs opposed the motion, and the Court subsequently granted the defendant's request to withdraw it without prejudice on May 30, 2003.

Subsequently, the plaintiffs sought to certify this action as class consisting of "all CenturyTel, Inc. ('CenturyTel') residential telephone customers who have paid charges for an inside wire maintenance service program described in CenturyTel's telephone bills as 'Non-Regulated Services' or 'Inside Wire Maint. Plan' from January 1, 1987 to the present (the 'Class'). Excluded from the Class are CenturyTel; its subsidiaries, affiliates, officers and directors; any entity in which CenturyTel has a controlling interest; and the legal representatives, heirs, successors and assigns of any such excluded party." *See* Pls.' Mot. for Class Cert.; Compl. at ¶ 11. The plaintiffs also have filed their own motion for judgment on the pleadings or for partial summary judgment.

II.

The first three counts of the complaint plead claims under sections 201(b), 206 and 207 of the Telecommunications Act. Section 201(b) states:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . The Commission may prescribe such rules and regulations as may be necessary in the public

> interest to carry out the provisions of this chapter.

47 U.S.C. § 201(b). Section 206 states that a common carrier who violates the Act is liable "for the full amount of damages sustained in consequence of any such violation . . . together with a reasonable counsel or attorney's fee." 47 U.S.C. § 206. Section 207 permits an aggrieved person to file a complaint with the FCC or commence an action in the district court.

Sixth Circuit precedent suggests that the question of whether a telecommunications carrier's billing practices are "unjust or unreasonable" presents a matter within the expertise of the FCC and is referable to its primary jurisdiction. *See In re Long Distance Telecomm. Litig.*, 831 F.2d 627 (6th Cir. 1987). In that case, a long distance carrier sued certain competitors alleging that the competitors failed to disclose certain bulling practices, rendering those bills "unreasonable and unjust" within the meaning of section 206(b). The district court dismissed the case because it found the claims were within the primary jurisdiction of the FCC. The court of appeals agreed that the doctrine of primary jurisdiction made the FCC the forum best able to decide the issue, but it held that the district court should not have dismissed the case. Rather, it should have transferred the case for resolution of the question and stayed the lawsuit until after the FCC acted. The case was followed with the same result in *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681 (E.D. Mich. 1999), where the plaintiffs challenged the billing practice of a communications service provider under section 201(b).

These cases make clear that the doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976). "The doctrine is properly invoked when enforcement of a claim in court would require resolution of issues that have already been placed within the special competence of an administrative body." *Kiefer*, 50 F. Supp. 2d at 683. But the doctrine must be applied on a case-by-case basis, *In re Long Distance Telecomm. Litig.*, 831 F.2d at 630, and it should not cause the court to abstain from determining a dispute unless "the reasons for the existence of the doctrine are present and . . . the purposes it serves will be aided by its application in the particular litigation." *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956); *see also Allied Tennessee v. Tennessee Pub. Srv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990) (stating that "[a] court must apply the doctrine of primary jurisdiction on a case-by-case basis, deferring to an administrative agency only when the reasons for the existence of the doctrine are present").

In *In re Long Distance Telecommunications Litigation*, the court recognized that two factors favoring application of the doctrine are the need for uniform application of a rule and the desirability of a specialized agency first passing on the disputed question. 831 F.2d at 630. Courts also should consider whether (1) the issue is within the conventional expertise of judges; (2) the issue lies within the agency's discretion or requires the exercise of agency expertise; (3) there is a substantial danger of inconsistent rulings; (4) a prior application to the

agency has been made; (5) the issue has already been addressed by the agency; (6) judicial economy is served by having the agency decide the question; and (7) referral will result in substantial delay and added expense. *See Gilmore v. Southwestern Bell Mobile Systems, L.L.C.*, 210 F.R.D. 212, 221 (N.D. Ill. 2001); *Young Soon Oh v. AT&T Co.*, 76 F. Supp. 2d 551, 557 (D.N.J. 1999).

In this case, both parties have filed supplemental briefs arguing that the case should not be transferred, although each party offers substantially different reasons for its position. The Court is persuaded that transfer would not serve the purpose of the primary jurisdiction doctrine because the FCC plainly has expressed its views on the issue presented and the economies are better served if the matter remains in the district court.

Although the language of the statute prohibiting "unjust or unreasonable" charges and billing practices leaves considerable room for interpretation, the FCC has enacted a clarifying regulation:

> (b) Descriptions of billed charges. Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered. The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs

> assessed for those services conform to their understanding of the price charged.

47 C.F.R. § 64.2401(b). In its report filed as part of the rulemaking process that led to this regulation, the FCC explained:

> We contemplate that sufficient descriptions will convey enough information to enable a customer reasonably to identify and to understand the service for which the customer is being charged. Conversely, descriptions that convey ambiguous or vague information, such as, for example, charges identified as "miscellaneous," would not conform to our guideline. *Similarly, in our view, a charge described by what it is not, such as, for example "service not regulated by the Public Service Commission" is inherently ambiguous and does not disclose sufficient information. There is no way for a consumer to discern from this description that the charge refers to, for example, inside wiring maintenance insurance.*

First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72 at 26 (Apr. 15, 1999) (emphasis added). The language chosen by the defendant to describe its optional inside wire maintenance service closely tracks the phrasiology criticized by the FCC as "inherently ambiguous," specifically as it might be applied to describe the very service at issue in this case. It is quite unlikely that the FCC would determine that language complied with its regulation. Although the FCC's pronouncement did not occur in the context of an actual controversy, the

uncanny overlay of the example given by the agency and the facts of this case allows the language of the report to serve as a suitable proxy for a prior adjudication for the purpose of obviating the need of a referral under the primary jurisdiction doctrine.

Likewise, there are other issues that must be decided in this action, such as whether the plaintiffs' class should be certified and whether the plaintiffs may proceed with their state law claims while seeking certification of a nationwide class. The delay inherent in a referral would not serve the parties' interests.

For these reasons, the Court declines to refer the case to the FCC under the doctrine of primary jurisdiction.

III.

The plaintiffs seek certification of the following class:

> [A]ll CenturyTel, Inc. ("CenturyTel") residential telephone customers who have paid for charges for an inside wire maintenance service program described in CenturyTel's telephone bills as "Non-Regulated Services" or "Inside Wire Maint. Plan" from January 1, 1987 to the present (the "Class"). Excluded from the Class are CenturyTel; its subsidiaries, affiliates, officers and directors; any entity in which CenturyTel has a controlling interest; and the legal representatives, heirs, successors and assigns of any such excluded party.

Pls' Mot. for Class Cert. at 1.

According to Federal Rule of Civil Procedure 23, a matter may proceed as a class action in the name of representative parties if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims and defenses of the representative parties are typical of the claims and defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (citing Fed. R. Civ. P. 23(a)); *Olden v. LaFarge Corp.*, 203 F.R.D. 254, 268 (E.D. Mich. 2001), *aff'd* 383 F.3d 495 (6th Cir. 2004). These factors are normally referred to as numerosity, commonality, typicality, and adequacy of representation.

A class must meet all of the above prerequisites plus one of those listed in Federal Rule of Civil Procedure 23(b) to be certified. *Amchem Prods., Inc.*, 521 U.S. at 614; *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). The plaintiff bears the burden of establishing that all prerequisites for class certification are satisfied. *Thompson v. County of Medina*, 29 F.3d 238, 241 (6th Cir. 1994).

A.

The first prerequisite to class certification under Rule 23(a) is numerosity. *Olden*, 203 F.R.D. at 268. There is no strict numerical test to determine when the class is large enough or too numerous to be joined under the Federal Rules of Civil Procedure. *Bremiller v. Cleveland Psychiatric Inst.*, 195 F.R.D. 1, 19 (N.D.

Ohio 2000). The Court may consider many factors, including "class size, ease of identification of members of the proposed class . . . geographic dispersion of class members, and whether proposed members of the class will be able to pursue remedies on an individual basis." *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 74 (D. N.J. 1995).

In this case, the plaintiffs have discovered that CenturyTel has approximately 1.7 million customers in 22 states, and that 500,000 to 700,000 customers have been billed for CenturyTel's wire maintenance service plan during each of the last few years. CenturyTel argues, however, that certification is not appropriate because the plaintiffs rely solely upon "conclusory allegations that joinder is impracticable." *Rockey v. Courtsey Motors, Inc.*, 199 F.R.D. 578, 582 (W.D. Mich. 2001) (stating that "[p]laintiffs are not required to specify the exact number of persons in the class, but cannot rely on conclusory allegations that joinder is impractical. Mere speculation as to the numbers of parties involved is not sufficient to satisfy Rule 23(a)(1)"). The defendant contends that an assertion that all CenturyTel customers receiving WireWatch were duped goes too far because it fails to recognize the multitude of customers who: (1) knowingly signed up for the service; (2) cannot claim they were misled by the billing statements; (3) benefitted from the service; or (4) would have enrolled in WireWatch notwithstanding the allegedly deceptive billing descriptions. Similarly, the plaintiffs' arguments ignore the fact that they have not isolated customers who were allegedly "crammed." In fact, "to date, [the] plaintiffs have only identified about a dozen alleged incidents of cramming in three states

(Michigan, Ohio and Montana) . . . This clearly does not constitute a class so 'numerous' that joinder would be impracticable." *See* Defendant's Amended Response in Opposition to Plaintiffs' Motion for Class Certification (Def's Opp) at 8-9.

However, "[t]he numerosity requirement is met when plaintiffs demonstrate that the number of potential class members is large, even if plaintiffs do not know the exact figure." *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 601 (E.D. Mich. 1985). "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982). Here, the plaintiffs state that between 500,000 and 700,000 customers may have been unwittingly charged for WireWatch. This suggests that some if not all of these customers are potential class members. Additionally, the defendants concede that there are at least a dozen potential class members are spread over three states. The plaintiffs do admit that the potential class members are easily ascertainable since the names and addresses of putative class members appear in a computer database in the defendant's control. Nonetheless, the amount of each claim, perhaps no more than a few hundred dollars, is a relatively small amount, when compared to the potential profits earned by the defendant if the allegations of the class prove to be true, suggesting that a class action may be the only effective remedy.

Moreover, the concerns of the defendant over identifying those customers who were not deceived by its billing descriptions, such as people who would have

enrolled anyway or who benefitted by their unwitting participation in the plan, confounds the liability issues with the matter of damages. The defendant will be liable for deceptive or misleading billing language, regardless of the desire of the customer for the service or a customer's subsequent actions. The damages that flow from that statutory violation might be reduced if the customer had ordered the service; but the point of the statute and clarifying regulation is that bills must be clear enough to allow customers to "accurately assess that the services for which they are billed correspond to those that they have requested." 47 C.F.R. § 64.2401(b). If the billing language is inadequate, a violation occurs, and it remains to determine the consequence of the violation. The plaintiffs suggest that the ambiguous billing practice was widespread, and therefore it is reasonable to accept the conclusion that the class is large. The matter of damages can be addressed by the creation of subclasses to conform to the circumstances shared by various members of the class whose losses may have varied depending on the consequences of the defendant's actions.

The Court finds that the numerosity requirement is satisfied.

B.

The second prerequisite for class certification is commonality. *Olden*, 203 F.R.D. at 269. Commonality simply means that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This provision does demand that all questions of law and fact raised in the complaint are common. "The

standard is not [that] demanding. 'Rule 23(a) simply requires *a* common question of law or fact.'" *Rockey*, 199 F.R.D. at 583 (quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997)).

In its response to the plaintiffs' motion for class certification, the defendant contests commonality by arguing that the presence of oral representations and the need for each plaintiff to show reliance undermines a finding of commonality. However, as noted above, the common claim in Count I arises out of continuous action by the defendant, namely its WireWatch billing practices, which suggests a violation by the issuance of telephone bills with ambiguous or deceptive language. The allegations of "cramming" in Count II may be narrower in scope, but that does not diminish the fact that claimed billing violations are common among the putative class members.

The Sixth Circuit has explained that the commonality and typicality requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiffs' claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir. 1998). The Court finds that the plaintiffs have established the commonality requirement.

C.

The third prerequisite for class certification is typicality. *Olden*, 203 F.R.D. at 269. Typicality

requires that a "sufficient relationship exist[] between the injury to the named plaintiff and conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Stout v. Byrider,* 228 F.3d 709, 717 (6th Cir. 2000). Although the named plaintiffs' claims must fairly encompass the class members' claim, they need not always involve the same facts or law. *See Sprague v. General Motors Corp.,* 133 F.3d 388, 399 (6th Cir. 1998); *Senter v. General Motors Corp.* 532 F.2d 511, 525 n.31 (6th Cir. 1976). "The test for typicality, like commonality, is not demanding." *Rockey*, 199 F.R.D. at 584.

In the present case, CenturyTel alleges that the typicality prerequisite is not met because of the great variance in damages sought by the named class members. Additionally, the defendant challenges a finding of typicality because there has been no showing on this record of how many of the putative class members were the victim of deceptive billing. The defendant contends that a myriad of legal and factual issues exist between the class representative and the putative class members, which destroys typicality. The underlying claims center around the existence of a contract. Thus, questions of oral modification, consent, ratification and acquiescence arise as to the individual claims and the individual class members.

Once again, however, the defendant's argument confounds the matters of liability and damages. A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). The

question presented is whether the billing language cited by the plaintiffs satisfies the requirements of the statute and regulation. If it does not, an additional question of what damages result may require the creation of subclasses. However, the Court believes that the plaintiffs have satisfied the typicality requirement and the resolution of the common issue should advance the resolution of the litigation. *Sprague,* 133 F.3d at 397.

D.

The fourth prerequisite for class certification is the adequate representation of the class by the class representatives. *Olden*, 203 F.R.D. at 270. "Adequate representation" invokes two inquiries: (1) whether the class counsel are "qualified, experienced and generally able to conduct the litigation" and (2) whether the class members have interests that are antagonistic to the other class members. *Stout,* 228 F.3d at 717. The plaintiffs list the numerous class action cases in which counsel has participated. The defendant does not argue that the plaintiffs' counsel is not qualified to represent the plaintiffs in this class action lawsuit. The plaintiffs' attorney is an experienced practitioner in this area.

The second consideration focuses on the possible antagonistic interests between the named plaintiffs and absent class members. "Antagonistic" means "mutually opposed" or "actively opposed." *Oxford English Dictionary* 501 (2d ed. 1989). "Interests are antagonistic when there is evidence that the representative plaintiffs appear unable to vigorous prosecute the interests of the class." *Stout*, 228 F.3d at

717-18. The defendant does not seriously contest that the plaintiffs adequately represent the class. The interests in this case, while of varying degrees, seem to all focus in the same direction. Thus, the Court finds that the plaintiffs have satisfied their burden with regard to the adequacy of representation.

The plaintiffs have satisfied all the prerequisites under Rule 23(a).

E.

The plaintiffs also contend that the putative class action meets the requirements of both mandatory and opt-out classes under Rule 23(b). *See Amchem Products, Inc.*, 521 U.S. at 615-17 (explaining differences between mandatory class actions and opt-out class actions). The plaintiffs point to Rule 23(b)(1) and argue that permitting individual lawsuits against the defendant would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members." Fed. R. Civ. P. 23(b)(1)(B). The Court disagrees. There is no evidence of other litigation against the defendant on similar grounds, and the adjudication of one claim would not have preclusive effect except, perhaps, under the rule of *stare decisis*, which is an ever-present risk. Nor does the plaintiffs' alternative reliance on Rule 23(b)(2) have merit. That rule contemplates actions for equitable relief, specifically injunctions. Although the plaintiffs have requested an injunction, it appears that the defendant amended its billing practices in May 2002 to eliminate reference to ambiguous terms when billing for optional inside wire

maintenance services. Moreover, the main thrust of the plaintiffs' case is to recover damages. "The court may not use a mandatory Rule 23(b)(2) class as an expedient to circumvent the requirements of Rule 23(b)(3), where the case is principally one for money damages." *Rockey*, 199 F.R.D. at 594.

Rule 23(b)(3) permits class certification when class suit "may nevertheless be convenient and desirable." Fed. R. Civ. P. 23 Adv. Comm. Notes, 28 U.S.C. App., p. 697. To qualify for certification under Rule 23(b)(3), a class must satisfy Rule 23(a) and meet two additional requirements: common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). To determine superiority, Rule 23(b) sets out factors to consider, although the list is not exhaustive:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D).

The predominance test focuses on attempting "to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis." *Rockey*, 199 F.R.D. at 588 (citation omitted). To determine if common issues predominate, the Court is "under a duty to evaluate the relationship between the common and individual issues . . . taking a pragmatic approach to determine the relative weight and importance of the common and individual issues." *Ibid.*

To prevail on their federal claims, the plaintiffs must show that the defendant's billing practices violated section 201 and they were injured by that violation. The plaintiffs conceded this point during the hearing on the motion for partial judgment on the pleadings on March 18, 2004, when counsel for the plaintiffs agreed that section 201 is not a strict liability statute, and that to establish a claim under section 206 the plaintiffs would have to show some type of injury. Based on that fact, the defendant argues that the need to prove causation for each plaintiff to show liability demonstrates that individual issues predominate. *Cf. Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000) (holding that a plaintiff fails to satisfy the requirements of Fed. R. 23(b)(3) when the factual core of a case is whether each putative member relied upon false representations). However, the necessity of each plaintiff proving the amount of his or her damages is generally not an impediment to class certification. *See Sterling v. Velsicol Chem. Corp.*, 855 F,2d 1188, 1197 (6th Cir. 1988). Although damages may be individualized and not all customers who

received ambiguous bills will say that they did not order or authorize the inside wire maintenance insurance program, the overarching question of whether the billing itself violates section 201(b) or Rule 64.2401 predominates and must be determined before any customer has a right to recover under that theory.

In *Olden v. LaFarge Corp*, 383 F.3d 495 (6th Cir. 2004), the Sixth Circuit rejected a similar argument that the specter of manifold individual damage determinations destroyed the predomination of the liability question. That case concerned a lawsuit brought by homeowners against the owner of a cement manufacturing plant alleging property and personal damages as a result of emissions. The defendant argued that "individual issues related to establishing causation will overwhelm the case because toxins: (a) originated from disparate sources within the one-square mile Lafarge facility and perhaps other industrial sources; (b) were dispersed to properties in varying concentrations; (c) allegedly caused a variety of personal injuries; and (d) allegedly caused widely varying property damages." *Id.* at 508. However, the court concluded that the defendant's arguments

> may suggest that individual damage determinations might be necessary, but the plaintiffs have raised common allegations which would likely allow the court to determine liability (including causation) for the class as a whole. . . . As the district court properly noted, it can bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can be decided by a special

> master or by another method. Fed. R. Civ. P. 23(c)(4)(A); *see also Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 30 (E.D.N.Y. 2001) ("By bifurcating issues like general liability or general causation and damages, a court can await the outcome of a prior liability trial before deciding how to provide relief to the individual class members."). Therefore, the aforementioned minor complaints can be dealt with in the damages phase if necessary, and it is likely premature to address these issues at this point.

Id. at 508-509.

Similarly, the questions of causation and damages in this case can be addressed later in the proceedings by means of a special master, representative trials, or other means. However, because the liability issue predominates, this case falls easily into the category of "cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Products, Inc.*, 521 U.S. at 615 (internal quotes and citation omitted).

In discussing superiority, the Supreme Court has observed that the rule drafters were mindful of the need to balance an individual's interest in exercising independent decisions in the course of litigation and the benefits that a group action may bring. *Id.* at 615-16. That balance tips in favor of class actions when the amount of potential individual recovery is

small, as here. The Court noted that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also Carroll v. United Compucred Collections Inc.*, 399 F.3d 620 (6th Cir. 2005) (approving class certification of action under the Fair Debt Collection Practices Act).

In this case, the potential recovery by an individual is relatively small, the liability issue predominates, the issues of management can be addressed by various procedural mechanisms and careful definition of subclasses, and the likelihood of an individual class member preferring to take control of the litigation is remote. The Court finds, therefore, that the plaintiffs have satisfied the requirements for certification of its class as an opt-out class under Rule 23(b)(3). The Court will grant the motion for class certification.

IV.

The plaintiffs also argue that they are entitled to judgment on the pleadings on Count I of their complaint pursuant to Federal Rule of Civil Procedure 12(c), contending that the defendant has admitted sending bills to customers describing its WireWatch program as "Non-Regulated Services," and that description in a bill is an "unjust and unreasonable" practice in violation of section 201(b) as a matter of

law. The defendant contends that the plaintiffs' interpretation of section 201(b) is not consistent with the FCC's stated intent behind its clarifying regulations or with analogous federal case law interpreting the Lanham Act. The defendant insists that the FCC's regulations are intended to be interpreted with regard for context and circumstance, including all of the documents provided to the customer regarding WireWatch and any verbal explanations provided at the time the service was ordered. In addition, the defendant argues that even if the Court finds that CenturyTel's billing practices violated section 201(b) as asserted in Count 1, that finding should be limited to the Michigan plaintiffs only for the time period between September 2000 and January 2002.

Federal Rule of Civil Procedure 12(c) allows "any party may move for judgment on the pleadings" "[a]fter the pleadings are closed." Although not typical, a plaintiff may bring a motion under this Rule. *Ramsey v. Amfac*, 960 F. Supp. 1424, 1426 (N.D. Cal. 1997). Judgment under Rule 12(c) is proper "when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Ibid.*

As noted earlier, Count I of the complaint is based on 47 U.S.C. § 201(b), which states that a "charge [or] practice" made in connection with a communications service "that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b). The defendant asserts that traditionally this statute was never applied to billing practices. That argument may have

been plausible at one time, but the Court believes that it is unconvincing because the statutory language plainly permits such a construction. *See United States v. Boucha*, 236 F.3d 768 (6th Cir. 2001) (stating the familiar rule of statutory construction that "[t]he language of the statute is the starting point to interpretation, and it should also be the ending point if the plain meaning of that language is clear"). It is not too much to ask of a communications vendor that its bills contain a description of the services for which it is demanding payment. To insist upon a charge without an explanation is a practice that can be understood to be unreasonable.

Moreover, the FCC, which specifically is authorized to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Telecommunications Act, 47 U.S.C. § 201(b), has determined that the statute applies to billing practices. The provisions of the regulation discussed earlier mandate billing that is "sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received." 47 C.F.R. § 64.2401(b). The defendant's custom of charging for its optional inside wire maintenance insurance under the heading "non-regulated services" gives no hint at the services for which charges are assessed. It does not satisfy the FCC's truth-in-billing requirement and constitutes an unreasonable practice within the meaning of section 201(b). Any doubt about the inadequacy of that description is dispelled by reference to the FCC's report. *See First Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-72 at 26 (Apr. 15,

1999) (stating that "in our view, a charge described by what it is not, such as, for example "service not regulated by the Public Service Commission" is inherently ambiguous and does not disclose sufficient information. There is no way for a consumer to discern from this description that the charge refers to, for example, inside wiring maintenance insurance").

It is well established that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The Supreme Court has held that the FCC is entitled to *Chevron* deference when enacting rules under section 201(b) of the Telecommunications Act. *See National Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. ___, ___, 125 S. Ct. 2688, 2699 (2005) (explaining that an FCC regulation receives *Chevron* deference because "Congress has delegated to the Commission the authority to . . . 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act") (quoting 47 U.S.C. § 201(b)).

The defendant contends that the billing statement description of WireWatch as a "Non-Regulated Service" is a true statement, and under section 64.2401(b) a court cannot determine whether a billing description violates section 201(b) without looking at the description in context of all other information provided to consumers. But this argument ignores the regulation's plain language, which requires that "[c]harges *contained on telephone bills* must be accompanied by a brief, clear, non-misleading, plain

language description of the service or services rendered." 47 C.F.R. § 64.2401(b) (emphasis added). Even if oral notice or additional documentation was provided to consumers, the information contained on the billing document was not provided as required. A violation of section 201(b) occurred when the defendant billed a customer for WireWatch service under the heading "non-regulated service." The practice was "unlawful," in the words of the statute. If "any common carrier . . . permit[s] to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured." 47 U.S.C. § 206. The injured person may commence an action against the carrier "in any district court of the United States of competent jurisdiction." 47 U.S.C. § 206. Since the defendant concedes that it did send some bills to customers that contained this language, judgment under Rule 12(c) is appropriate because the practice is unlawful as a matter of law.

By the same reasoning, however, the Court has no trouble concluding that bills that charged for "Inside Wire Maint. Plan" were adequate to constitute a "plain language description of the service or services rendered." 47 C.F.R. § 64.2401(b). That description was clear and specific, and it stated precisely the basis for the charge. The Court finds that bills that contained that description complied with the statute and regulation as a matter of law. To the extent that the plaintiffs seek to define their class as including customers who received bills with that description, the class definition will be modified.

The defendant also contends that its liability cannot predate November 18, 1999 when the regulation took effect. Although agency rules typically will not be applied retroactively in the absence of express statutory authority, a rule clarifying an unsettled or confusing area of law "does not change the law, but restates what the law according to the agency has always been. 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'" *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998). Here, the Regulation simply clarified an unsettled area of law.

The defendant also relies on the Telecommunication Act's two year statute of limitations codified at 47 U.S.C. § 415. However, fact issues preclude that application of that limitation at this time because a cause of action under the Act accrues on the date of the discovery of the injury; the discovery rule could extend the two-year period, which begins to run from the date when the plaintiff discovers or with reasonable diligence should have discovered the injury. *MCI Telecomm. Corp. v. FCC*, 59 F.3d 1407, 1416-17 (D.C. Cir. 1995). The plaintiffs assert that they did not discover nor could they have discovered the injury until January 2002, when the defendant changed its billing descriptions to reveal for the first time the basis of the charges. That determination requires factual development.

Based on the allegations and admissions in the pleadings, the Court concludes that the defendant's practice of billing for its WireWatch program using the description "Non-regulated Services" constitutes a violation of section 201(b) of the Telecommunications

Act as a matter of law. The parties have not offered information as to the extent of the practice or the damages that might have been caused. Those determinations will require factual resolution through further motion practice or trial. However, the plaintiffs' motion for judgment on the pleadings will be granted as to the narrow issue discussed with respect to Count I of the complaint.

V.

The plaintiffs also have moved under Federal Rule of Civil Procedure 12(f) to strike paragraphs six and eight of the defendant's affirmative defenses on the grounds that they are insufficient and entirely inconsistent with the positions and admissions set forth in the defendant's answer. The two affirmative defenses state:

> 6. The relief requested in the Complaint is barred by applicable statutes of limitations in CenturyTel's respective state and federal tariffs.
>
> * * *
>
> 8. This Court lacks jurisdiction over the subject matter of the Complaint for the reason that the Michigan Legislature has provided the Michigan Public Service Commission with jurisdiction and authority to adjudicate "slamming and cramming" disputes.

Def.'s Affirmative Defenses. The plaintiffs argue that if inside wire maintenance services are non-regulated services, as the parties agree in their respective

pleadings, then defenses which purport to treat the wire maintenance program as regulated services should be stricken as superfluous and inadequate as a matter of law because these purported defenses improperly assume that the issues in this case are somehow governed by, or related to, the defendant's tariffs for regulated transmission services.

The defendant responds that the Federal Rules of Civil Procedure reflect the policy that pleadings should be treated liberally, and that a party should have the opportunity to support its contentions at trial. Since discovery has not been completed and the plaintiffs have not alleged prejudice, the motion should be denied because the defendant may be able to set forth a factual scenario in which the affirmative defenses are determinative. The defendant does, however, agree to abandon its eighth affirmative defense, which argues that the Michigan Public Service Commission has primary jurisdiction over the cramming and slamming disputes.

Courts disfavor motions to strike. *Ciminelli v. Cablevision*, 583 F. Supp. 144, 162 (E.D.N.Y. 1984). A motion to strike a defense will be denied unless the defense asserted is clearly insufficient as a matter of law. *Durham Indus., Inc. v. North River Ins. Co.* , 482 F. Supp. 910, 913 (S.D.N.Y. 1979). If the sufficiency of the defense depends upon disputed questions of law or fact, then a motion to strike should be denied. *Linker v. Custom-Bilt Mach. Inc.*, 594 F. Supp. 894, 898 (E.D. Pa. 1984). Therefore, a motion to strike should only be granted if there is a clear showing that the challenged defense has no bearing on the subject matter and that permitting the defense to stand would prejudice the

plaintiff. *FRA S v. Surg-O-Flex of Am., Inc.*, 415 F. Supp 421, 427 (S.D.N.Y. 1976).

The plaintiffs have not made such a showing here. Moreover, even if this case has nothing to do with the defendant's regulated rates or tariffs, any affirmative defenses related to such matters are superfluous and insufficient as a matter of law, the plaintiffs fail to show how they will be prejudiced by permitting the defense to stand. Therefore, the Court will deny the plaintiffs' motion to strike the defendant's sixth defense, but the eighth affirmative defense will be stricken by agreement.

VI.

The Court finds that this case or any aspect of it should not be referred to the Federal Communications Commission for resolution of any issue under the doctrine of primary jurisdiction. The Court will certify the action as a class action under Rule 23(b)(3). The Court also finds that the defendant's billing practice described above violates 47 U.S.C. § 201(b) and 27 C.F.R. § 64.2401(b) as a matter of law. The plaintiff has failed to establish gounds to strike the defendant's affirmative defense number six.

Accordingly, it is **ORDERED** that the plaintiffs' motion for class certification [dkt # 21] is **GRANTED**. The determination of class certification is conditional and may be altered or amended prior to the decision on the merits in light of any changes in circumstances that make such action advisable. *See* Fed. R. Civ. P. 23(c)(1).

It is further **ORDERED** that pursuant to Federal Rule of Civil Procedure 23(b)(3), the following class is certified in this cause:

> All persons who have paid CenturyTel, Inc. for charges for an inside wire maintenance insurance program described in CenturyTel's residential telephone bills as "Non-Regulated Services" during the period beginning October 29, 2000, or such earlier period if the charges were not know or reasonably could have been known by October 29, 2000; but excluding CenturyTel; its subsidiaries, affiliates, officers and directors; any entity in which CenturyTel has a controlling interest; and the legal representatives, heirs, successors and assigns of any such excluded party.

It is further **ORDERED** that counsel of record for the named plaintiffs in this matter, namely Elwood S. Simon, Esquire and George G. Burke, III, Esquire, shall be appointed counsel for the designated class.

It is further **ORDERED** that the plaintiffs shall, at their expense, provide appropriate notice to all class members via first-class mail and in conformance with the requirements of Rule 23 of the Federal Rules of Civil Procedure. The notice shall provide putative class members until **June 2, 2006** to notify the counsel for the parties and the Court of their intent to opt out of the proposed class. The notice shall also provide that class members wishing to enter their own appearance in the matter through counsel shall do so by that same date.

It is further **ORDERED** that the parties shall confer and forward to the Court on or before **March 23, 2006** an agreed document that will be used to serve notice upon all members of the class. If the parties are unable to agree on the proper text for said notice, the parties shall forward the plaintiffs' proposed text along with a detailed list of objections from the defendant. The notice shall not be sent until Court approval is given. The notice shall be submitted for approval on or before **March 26, 2006**.

It is further **ORDERED** that the plaintiffs' motion for partial judgment on the pleadings [dkt # 18] is **GRANTED IN PART** with respect to Count I of the complaint. The Court determines that the defendant's billing practice during the relevant period describing charges for its WireWatch or other inside wire maintenance insurance program as "Non-Regulated Services" in unlawful within the meaning of 47 U.S.C. § 201(b) as a matter of law; and bills describing such charges as "Inside Wire Maint. Plan" were lawful within the meaning of 47 U.S.C. § 201(b) as a matter of law.

It is further **ORDERED** that the plaintiffs' motion to strike affirmative defenses [dkt # 18] is **DENIED**; however by agreement of the parties affirmative defense number 8 is **STRICKEN**.

It is further **ORDERED** that the parties appear for a Case Management and Scheduling Conference on **March 27, 2006 at 4:00 p.m.**

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: March 10, 2006

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-1565

[Filed April 29, 2008]

BARBRASUE BEATTIE, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
CENTURYTEL, INC.,	)
	)
Defendant-Appellant.	)
	)

ORDER

BEFORE: COLE and COOK, Circuit Judges; and FROST,* District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other

* Hon. Gregory L. Frost, United States District Judge for the Southern District of Ohio, sitting by designation.

active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

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(2)

No. 08-414

Supreme Court, U.S.
FILED
OCT 17 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CENTURYTEL, INC.,

Petitioner,

v.

BARBRASUE BEATTIE and JAMES SOVIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the petition sets forth any compelling reasons to review the Sixth Circuit's decision holding that the district court acted within its discretion in entering an interlocutory order certifying a class of consumers for claims against their telephone company for unjust and unreasonable billing practices in violation of the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

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Respondents Barbrasue Beattie and James Sovis (collectively, "respondents"), plaintiffs below, hereby oppose the petition for a writ of certiorari. None of the reasons advanced by Petitioner CenturyTel, Inc. ("CenturyTel" or "petitioner"), defendant below, support the Court's review of the court of appeals' decision to affirm, in part, and remand, in part, the district court's class certification order.

First, and most importantly, this petition relates to the district court's interlocutory order granting, in part, respondents' motion for class certification. On appeal pursuant to Fed. R. Civ. P. 23(f), the Sixth Circuit held that the district court acted within its discretion in certifying a class and remanded the matter for further proceedings. As such, this appeal of an interlocutory procedural ruling is not a good vehicle for the Court to address, as petitioner requests, the nature of the proofs necessary to establish a claim under the Federal Communications Act of 1934 ("Communications Act"), 47 U.S.C. § 151 *et seq.* As CenturyTel readily acknowledges in its petition, the district court already concluded that CenturyTel violated 47 U.S.C. § 201(b) and "CenturyTel does not here challenge that ruling." Pet. 7-8. Before engaging in any further appellate review, the litigation in the district court should be permitted to proceed to a final judgment. "[T]his Court above all others must limit its review of interlocutory orders." *Goldstein v. Cox*, 396 U.S. 471, 478 (1970).

Second, the conduct that resulted in this litigation is unlikely to reoccur. Petitioner is a telephone service provider that systematically billed its customers for an optional inside wire maintenance plan (called

"WireWatch") under the description "Non-Regulated Services." The Federal Communications Commission ("FCC") has made it clear that "a charge described by what it is not" is "inherently ambiguous and does not disclose sufficient information." *In the Matter of Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Truth-In-Billing and Billing Format,* 14 F.C.C.R. 7492, at 7518 (F.C.C. Apr. 15, 1999). Petitioner itself purportedly ceased its practice of billing for WireWatch as "Non-Regulated Services" in January 2002. Given the clarity of the FCC's position on the specific challenged practice, it is unlikely that any telecommunications company would use similar billing language today. Therefore, a ruling by this Court on class certification issues is unlikely to have a material impact on any telecommunication industry billing practices taking place now or in the future.

Third, there is no conflict among the circuits. Petitioner's contention that the Sixth Circuit's decision is in conflict with *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001), is specious. *Conboy* was filed as a class action, including claims for violation of Section 222 of the Communications Act, 47 U.S.C. § 222, but class certification was never addressed. The case was instead dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Thus, *Conboy* involved an appeal from a final judgment that was subjected to *de novo* review by the Second Circuit. The Sixth Circuit's decision below, in contrast, held that the district court did not abuse its discretion in certifying a class for truth-in-billing claims pursuant to Section 201(b).

Finally, respondents respectfully submit that the Sixth Circuit's interpretation of Section 206 of the Communications Act, 47 U.S.C. § 206, was correct and appropriate. Even if the Sixth Circuit had misapplied the statute in the class context, however, any further appellate proceedings should await a final judgment on the merits. *See* Sup. Ct. R. 10.

These considerations all weigh against further appellate review of the district court's interlocutory order by this Court.

COUNTERSTATEMENT OF THE CASE

On October 28, 2002, respondents commenced this action against CenturyTel after discovering that they and other CenturyTel telephone customers had been unlawfully billed, and had paid such unlawfully billed charges, for WireWatch. Respondents allege that CenturyTel's systematic practice of billing customers a small monthly fee for WireWatch under the label "Non-Regulated Services" constituted "unjust and unreasonable" billing practices in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), and the FCC's related truth-in-billing and Billing Format regulations, 47 C.F.R. § 64.2401.[1]

Beginning in at least 1994, CenturyTel's telephone billings to respondents and other residential telephone customers included a monthly charge, generally ranging

---

1. Respondents allege additional federal and state law claims that are not at issue in connection with this petition.

from $0.50 to $0.99, described in a line item on the bills as "Non-Regulated Services." As reflected in an excerpt from one of respondent Beattie's telephone bills, these charges were presented by CenturyTel in the following manner:

MONTHLY SERVICE DETAIL		
LOCAL SERVICE IN ADVANCE FROM XXX TO XXX	$ 15.55	
SUBSCRIBER LINE CHARGE – INTER	3.50	
SUBSCRIBER LINE CHARGE - INTRA	3.50	
NON-REGULATED SERVICES	*.99*	
OTHER CHARGES	.07	
MONTHLY SERVICE AMOUNT FOR XXX-XXX-XXXX	23.61	
TOTAL MONTHLY SERVICE AMOUNT		23.61
FEDERAL TAX	.68	
STATE TAX	1.41	
911 EMERGENCY SYSTEM	.23	
911 OPERATIONAL SYSTEM	2.01	
TOTAL OF TAXES		4.33
TOTAL CenturyTel		27.94

(Emphasis added.)

In May 2001, CenturyTel increased the charge for WireWatch to $3.95, which it continued to bill under the line item description "Non-Regulated Services." It was not until January 2002 that CenturyTel reorganized its billing format and changed the line item description to reflect that the billed charges were actually for "Inside Wire Maint. Plan." It was this change in CenturyTel's billing format and description that finally allowed consumers to recognize that the charge for "Non-Regulated Services" was actually a charge for WireWatch. In their complaint, respondents allege that: (1) by billing for WireWatch along side customers' regulated telephone transmission charges; (2) by billing for WireWatch under the description "Non-Regulated Services" and under the heading "Monthly Service Detail;" and (3) by keeping the monthly fee relatively low (*i.e.*, $0.50 to $3.95), CenturyTel engaged in "unjust and unreasonable" billing practices in violation of Section 201(b) of the Communications Act and 47 C.F.R. § 64.2401.

Respondents moved for class certification. On March 10, 2006, the district court denied the request to certify a mandatory class under Fed. R. Civ. P. 23(b)(1) and (b)(2), but certified an opt-out class under Rule 23(b)(3), albeit with a substantially narrowed class definition and limited to the unlawful billing claim. App. 44a-57a.[2]

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2. The district court defined the class as: "All persons who have paid CenturyTel, Inc. for charges for an inside wire maintenance insurance program described in CenturyTel's residential telephone bills as "Non-Regulated Services" during the period beginning October 29, 2000, or such earlier period if

(Cont'd)

The district court also granted respondents' motion for partial judgment on the pleadings, concluding that, "based on the allegations and admissions in the pleadings" (including CenturyTel's answer), CenturyTel's practice of billing charges for WireWatch under the description "Non-Regulated Services" was an unjust and unreasonable billing practice that violated 47 U.S.C. § 201(b), as a matter of law. App. 57a-63a. Petitioner has not sought to appeal the district court's ruling that CenturyTel is liable under the Communications Act to persons who paid for WireWatch pursuant to such unlawful billings.

On May 2, 2006, the Sixth Circuit granted CenturyTel's Fed. R. Civ. P. 23(f) petition for leave to bring an interlocutory appeal of the class certification order. On December 18, 2007, the Sixth Circuit upheld class treatment for respondents' unlawful billing claims under the Communications Act. App. 1a. The court stated, in part, as follows:

> [U]nder § 206, Plaintiffs-Appellees must establish that each class member was injured by CenturyTel's violation of § 201(b). 47 U.S.C. § 206 (stating that a "common carrier shall be liable to the person or persons

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(Cont'd)

the charges were not know[n] or reasonably could [not] have been known by October 29, 2000; but excluding CenturyTel; its subsidiaries, affiliates, officers and directors; any entity in which CenturyTel has a controlling interest; and the legal representatives, heirs, successors and assigns of any such excluded party." App. 66a.

injured" by its unlawful practice). *This can be done by showing that each class member paid for WireWatch during the period when the service was billed under the misleading description.* Before the district court, CenturyTel admitted that "it did send some bills to customers that contained this language," *Beattie*, 234 F.R.D. at 173, and an inventory of CenturyTel's billing records could disclose which customers paid their bills in full, which would include a payment for fees associated with WireWatch. On appeal, CenturyTel argues that "only those customers who can establish that they did not want or request the WireWatch service can establish CenturyTel's liability. . . ." (Appellant's Br. 40.)

CenturyTel is incorrect. Under § 206, CenturyTel is liable if it violated § 201(b), which makes it unlawful for CenturyTel to bill for a service under a misleading description, even where the customer requested the service. *See* 47 C.F.R. § 64.2401(b) ("The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received. . . ."). True, each class member will have to show that she did not enroll in WireWatch, but that is relevant, as the district court concluded, to the issue of damages and not liability. Thus, Plaintiffs-Appellees should be able to establish liability for the class as a

> whole because the misleading description used by CenturyTel violated § 201(b), and *class members were injured by that violation when they paid their telephone bill, which included a charge for WireWatch under a misleading description (a § 206 violation).*

App. 23a-24a (emphasis added).

The litigation in the district court has continued throughout the interlocutory appeal process and remains active today. On June 7, 2006, the district court denied petitioner's emergency motion to stay proceedings pending the decision by the Sixth Circuit. Thereafter, the parties continued with discovery, and multiple discovery motions were filed and resolved by the district court.

On June 18, 2008, the Sixth Circuit denied petitioner's Motion for Stay of Mandate Pending Filing of a Petition for a Writ of Certiorari. The district court has since complied with the Sixth Circuit's directive to address on remand the possible certification of respondents' remaining state law claim by denying, without prejudice and with leave to re-file, respondents' request to certify the class with respect to claims for unjust enrichment. The parties continue to engage in discovery, with deposition discovery commencing in late October 2008.

REASONS FOR DENYING THE PETITION

The petition advances no compelling reason that warrants review of the Sixth Circuit's decision below. This appeal concerns an interlocutory order, reviewed by the Sixth Circuit under an abuse of discretion standard, that involves underlying factual conduct that is unlikely to reoccur. There is no conflict among circuits in need of resolution. And even if the Sixth Circuit had misapplied Section 206 (respondents respectfully submit that it did not), any further appellate review should await a final judgment on the merits.

I. THIS COURT RARELY REVIEWS INTERLOCUTORY RULINGS.

This appeal of an interlocutory, procedural order does not present a good opportunity for the Court to address the nature of the proofs necessary to establish a claim under Section 206 of the Communications Act. Class certification rulings are "inherently interlocutory," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), and this Court has historically been reluctant to review interlocutory orders. *See Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("[T]his Court above all others must limit its review of interlocutory orders."); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review of an interlocutory order."). As the Court explained in *Firestone Tire & Rubber Co. v.*

Risjord, 449 U.S. 368 (1981), the "final judgment rule" serves several salutary purposes:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.

Id., at 374 (citations and internal quotation marks omitted).[3]

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3. *See also Johnson v. Jones*, 515 U.S. 304, 309 (1995) (An interlocutory appeal threatens "delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.") (citations omitted); 19 James Wm. Moore, Moore's Federal Practice § 201.10[1] (3d ed. 2008) ("The (Cont'd)

In 1998, the Court promulgated Fed. R. Civ. P. 23(f) as a narrow exception to the general rule against piecemeal appeals. *See In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) ("[T]he Rule 23(f) appeal is never to be routine."); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005) ("We begin with the premise that Rule 23(f) review should be a rare occurrence."). In particular, there is a short time limit—10 days—within which the aggrieved party can ask the court of appeals to exercise its discretion. *See* Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments, Subdivision (f) ("The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.D.C. 2002) ("Delay caused by interlocutory appeals under Rule 23(f) may be less of a concern because filing a petition does not automatically stay the litigation") (citation omitted). In exercising their discretion, courts of appeals have remained cognizant of the fact that "[t]hese appeals add to the heavy workload of appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Chamberlan*, 402 F.3d at 959.

(Cont'd)
purposes of the final judgment rule are to avoid piecemeal litigation, to promote judicial efficiency, and to defer to the decisions of the trial court. Unfettered interlocutory appeals would disrupt both the trial and appellate processes.").

Despite an avalanche of Rule 23(f) applications over the past decade, petitioner has not cited — and respondents have not located — a single instance where the Court has accepted review of such an appeal.[4] The petition also fails to raise a serious question concerning generally applicable Rule 23 standards that might warrant review by this Court. *Compare Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (the Court "granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification.").[5]

Instead, petitioner asks this Court to address the injury and causation requirements of Section 206, but a Rule 23(f) appeal is not a good vehicle for the Court to consider the substantive scope and parameters of underlying claims that are not yet the subject of a final judgment. Petitioner notes that the district court "determined that CenturyTel's billing description for WireWatch as Non-Regulated Services violated 47 U.S.C. § 201(b). App. 67a. CenturyTel does not here challenge that ruling." Pet. 7-8. Petitioner does not challenge that ruling because it *cannot* challenge that ruling; it is not the subject of a final judgment, nor has

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4. *See, e.g.*, *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007), *cert. denied*, __ U.S. __, 128 S. Ct. 1120 (2008); *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); *Carnegie v. Household Intern., Inc.*, 376 F.3d 656 (7th Cir. 2004), *cert. denied*, 543 U.S. 1051 (2005).

5. *Amchem* arose prior to promulgation of Rule 23(f) and involved an appeal from a final judgment.

it been certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Court should not expend its limited resources interpreting the nature and scope of a statutory claim in circumstances where the Court is not required to reach the merits of the claim. *See Delta Airlines*, 310 F.3d at 960 ("The Rule 23(f) appeal should not become a vehicle for early review of a legal theory that underlies the merits of a class action"). As this is also one of the rare cases where review of an interlocutory class certification order has been allowed, four federal judges (*i.e.*, the district judge and a unanimous panel of the Sixth Circuit) have now weighed in on the propriety of class certification. That is sufficient interlocutory review at this time. Further appellate review, if any, should follow a final judgment in the ordinary course.

II. THE UNDERLYING FACTUAL EVENTS ARE UNLIKELY TO REOCCUR.

In addition to the interlocutory nature of this appeal, this case is not a good vehicle for further addressing, or offering advance guidance on, telecommunication industry billing practices. In adopting the truth-in-billing regulation (47 C.F.R. § 64.2401), the FCC has already explained:

> We contemplate that sufficient descriptions will convey enough information to enable a customer reasonably to identify and to understand the service for which the customer is being charged. Conversely, descriptions that convey ambiguous or vague

> information, such as, for example, charges identified as "miscellaneous," would not conform to our guideline. *Similarly, in our view, a charge described by what it is not, such as, for example "service not regulated by the Public Service Commission" is inherently ambiguous and does not disclose sufficient information. There is no way for a consumer to discern from this description that the charge refers to, for example, inside wiring maintenance insurance.*

In the Matter of Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Truth-In-Billing and Billing Format, 14 F.C.C.R. 7492, at 7517-18 (F.C.C. Apr. 15, 1999) (emphasis added).

Petitioner's practice of billing for WireWatch as "Non-Regulated Services" utilized billing language remarkably similar to FCC's example of an *inadequate* billing description. *See* App. 43–44a (district court noted the "uncanny overlay of the example given by the agency and the facts of this case"). Petitioner itself maintains that it ceased the challenged practice in January 2002, and it is unlikely that telecommunication companies today would employ billing descriptions that are in open defiance of the FCC's admonition. Therefore, a decision by this Court addressing the underlying facts likely would not have a material impact on current or future telecommunication industry billing practices.

III. THE SIXTH CIRCUIT RULING IS NOT IN CONFLICT WITH THE RULINGS OF ANOTHER CIRCUIT.

As the Court of last resort, certiorari may be especially appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). In a specious effort to invoke this consideration, petitioner asserts that the Sixth Circuit's decision conflicts with the decision in *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001). Pet. 25-29.

Petitioner mischaracterizes *Conboy* as holding that "liability could not be proven on a class-wide basis." Pet. 25. While *Conboy* was filed as a class action, the issue of class certification was never reached. Instead, the district court dismissed the case pursuant to Fed. R. Civ. P. 12(b)(6), and the Second Circuit affirmed. Thus, *Conboy* was an appeal from a final judgment that was subjected to *de novo* review. 241 F.3d at 246. Even if petitioner's contentions concerning *Conboy's* interpretation of the Communications Act were substantively correct, such a holding on the merits could not be "in conflict" with a decision upholding a district court's exercise of discretion in certifying a class. *See* App. 8a-9a ("The district court maintains substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation.") (citation omitted). Indeed, the Sixth Circuit did not find it necessary to even mention *Conboy* (which is not surprising since *Conboy*

has nothing to do with class certification).[6] Class certification is a procedural matter and Rule 23 does not give "a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).[7]

In any event, nothing in the Sixth Circuit's opinion suggests a conflict with *Conboy*. There, consumers alleged that AT&T, their long-distance telephone carrier, unlawfully disseminated proprietary customer information in violation of Section 222 of the Communication Act, 47 U.S.C. § 222. In order to establish a claim for damages, plaintiffs first argued that "they have paid AT&T a monthly fee to keep their names, address, and telephone number unlisted." *Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 498-99 (S.D.N.Y. 2000). Second, plaintiffs argued that "they have paid AT&T for telephone services which include the privacy protections of the Telecommunications Act." *Id.* at 499. According to plaintiffs, the actions of AT&T deprived them of the value of both of these payments.

The first argument failed because, "as AT&T correctly points out, the fee for non-published service to which plaintiffs refer, is paid to Bell Atlantic, and not

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6. Tellingly, petititoner's opening brief to the Sixth Circuit relegated its discussion of *Conboy* to single footnote.

7. For example, if the district court in *Conboy* had addressed and granted class certification (which it did not) before AT&T prevailed on the merits, procedurally AT&T would have prevailed against a class, rather than just the named plaintiffs.

AT&T." 84 F. Supp. 2d at 499. Bell Atlantic was not a defendant. "[P]laintiffs cannot use their payment to Bell Atlantic for 'non-published service' as the basis for their claim for damages against AT&T, because these payments represent the value of Bell Atlantic's compliance—not AT&T's compliance—with the terms of the 'non-published service' agreement." 241 F.3d at 249. The second argument failed because "plaintiffs did not make monthly payments to AT&T for compliance with the Telecommunications Act; rather, they paid AT&T for long-distance telephone service, which they received." 241 F.3d at 250. In AT&T's bill, "every penny paid to AT&T is accounted for, either in the form of itemized charges, surcharges, or taxes." *Id.* Finally, the Second Circuit upheld the district court's rejection of the alternative argument that damages for "emotional distress and mental anguish" could simply be presumed. 241 F.3d at 250-51; 84 F. Supp. 2d at 499 n. 3.

As the discussion above demonstrates, the key problem for the *Conboy* plaintiffs was that they could not point to a separate line item in their telephone bills reflecting a charge from AT&T for its compliance with privacy requirements. The plaintiffs therefore had to either (1) characterize payments to Bell Atlantic as payment for something that they were deprived of by AT&T, or (2) characterize payments to AT&T as consideration for a Telecommunications Act compliance component, notwithstanding the lawful description of the charges. Respondents here need not engage in such machinations because there is (1) a separate line item charge for "Non-Regulated Services" in their bills, (2) that caused them to pay a specific amount of money, (3) to petitioner. The allegation of specific economic

damages suffered as a consequence of petitioner's violation of the Communications Act is also distinguishable from the "'presumed damages' for emotional distress and mental anguish" (241 F.3d at 249) alleged and rejected in *Conboy*. All class members here incurred economic injury when they paid CenturyTel for the WireWatch unlawfully billed as "Non-Regulated Services."

Accordingly, there is no evident conflict among circuits necessitating immediate resolution by this Court. Petitioner's argument merely stretches some of the reasoning in *Conboy* in an attempt to support its already twice-rejected contentions, which is insufficient grounds to warrant further review.

IV. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT ACTED WITHIN ITS DISCRETION.

Finally, to the extent it may be relevant to this Court's consideration of the petition, respondents respectfully submit that the Sixth Circuit's inquiry into Section 206 requirements is entirely correct. *See* App. 23a-24a. Even if the Sixth Circuit had misapplied the statute in these circumstances, however, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

There is clearly a causal link between the Section 201(b) violation and consumers' payments to CenturyTel of the amounts so billed for "Non-Regulated Services."

As the Sixth Circuit correctly recognized, the FCC enacted a regulation intended to confirm the meaning of Section 201(b) "so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged." App. 21a (quoting 47 C.F.R. § 64.2401(b)). When petitioner failed to provide a proper description of its WireWatch charge in its bills, consumers were, at a minimum, unlawfully deprived of the opportunity to: (1) object to the charge as unauthorized and/or withhold payment; (2) cancel the service; or (3) take advantage of the service by making a claim. Payments by consumers of the amounts unlawfully billed for "Non-Regulated Services" are the natural consequences of the billing violation, rendering such payments an injury under Section 206. *Cf. Edwards Industries v. Bell Telephone Company of Nevada*, 74 F.C.C. 2d 322, 328 ¶17 (FCC 1979) ("We believe that the damages claimed by Complainants could be expenses that would flow under these circumstances as natural consequences from the violations which have been alleged and, as such, are recoverable under Section 206 of the Act.").

Petitioner's reliance on the Court's interpretation of causation under RICO, sheds little, if any, light on the proper causation analysis of the Communications Act. Pet. 17-18.[8] The Court has recognized that the

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8. Petitioner asserts that "Section 206, and the Court's decision in *Holmes* [*v. Sec. Investor Protect Corp.*, 503 U.S. 258 (1992)], clearly require proof of causation, which the Sixth Circuit wholly ignored in its assessment of the class certification (Cont'd)

federal statute most analogous to the Communications Act is the Interstate Commerce Act ("ICA"). *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 127 S.Ct. 1513, 1517 (2007).[9] Courts have therefore held that decisions construing the ICA are persuasive in establishing the meaning of the Communications Act. *Conboy*, 241 F.3d at 250 ("Sections 206 [and] 207 [of the Communications Act] . . . are the present law in sections 8 [and] 9 . . . of the Interstate Commerce Act. . . .") (quoting H.R. Rep. No. 73-1850, at 6 (1934)).

In *Interstate Commerce Commission v. Transcon Lines*, 513 U.S. 138 (1995), for example, the Court upheld the ICC's authority to enjoin the collection of liquidated damages for, among other things, failure to include in billing documents the notice language required by regulation. *See* 513 U.S. at 145 ("To the extent the ICC seeks to enjoin collection of liquidated damages as a remedy for Transcon's lack of notification in the original bills, see 49 C.F.R. § 1320.3(c) (1992), and nonissuance of revised bills within 90 days, see

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(Cont'd)
criteria." Pet. 18. The Sixth Circuit was not alone in ignoring *Holmes*; petitioner never referred to the decision in either of its briefs on appeal or at oral argument. In any event, the Sixth Circuit did expressly consider causation. *See* App. 23a-24a.

9. *See Global Crossing*, 127 S. Ct. at 1517 ("The relevant sections (in both statutes) . . . authorize an injured person to recover 'damages' for an 'unlawful' charge or practice . . .") (citations omitted).

§ 1320.2(g)(2)(vi), this remedy too is appropriate.").

> First, its remedy appears to the ICC, and to us, necessary to the effective enforcement of its regulations. Were we to disallow the injunction, respondents and other trustees of bankrupt carriers would be immune, in effect, from enforcement of the credit regulations . . . .
>
> Second, . . . *the requirements for notice of liquidated damages are to protect shippers from the imposition of penalties without warning. When a carrier fails to provide notice, it is an appropriate remedy for the ICC to bar collection of the liquidated damages, for the remedy serves the regulations' intended beneficiaries.*

513 U.S. at 146-47 (citations omitted; emphasis added). The only charge there that could not be collected was the undisclosed charge for liquidated damages, the filed rate for shipping remained enforceable. *Id.* at 148.

Here, because the truth-in-billing requirements are intended to protect consumers (just like the requirement of notice of liquidated damages in *Transcon* was to protect the shippers), the telecommunications provider — not the consumer — bears the burdens of the violation. If petitioner is permitted to shift the burden of ***its*** billing violation onto its customers —

e.g., by requiring each customer to individually prove he or she did not understand the unlawfully described charge — the truth-in-billing requirements would be meaningless and unenforceable. *Cf. Interstate Commerce Commission v. United States ex rel. Campbell*, 289 U.S. 385, 390 (1933) ("The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.") (citation omitted) (cited in *Conboy*, 241 F.3d at 250).

Petitioner may, indeed, be entitled to seek a credit or a set-off for various considerations. For example, the district court's order indicated that questions of damages in this case "can be addressed later in the proceedings by means of a special master, representative trials, or other means." App. 56a; *cf. Barnes v. Illinois Bell Tel. Co.*, 1 F.C.C. 2d 1247 ¶ 42 (FCC 1965) ("Although the amount of damages need not be established with precise mathematical accuracy, it must be shown with reasonable certainty and by the best means possible under the circumstances.").

These are important issues that the district judge will have to address as the case progresses toward conclusion. In an appeal following a final judgment, appellate courts will know exactly how the district court handled these issues. Considerations of judicial efficiency, therefore, weigh heavily in favor of allowing this case to progress to a final judgment before expending any further appellate resources.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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In The
Supreme Court of the United States

CENTURYTEL, INC.,

Petitioner,

v.

BARBRASUE BEATTIE and JAMES SOVIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

Compelling reasons warrant review of the Sixth Circuit's decision. Despite Respondents' claims to the contrary, (BIO at 9), this case presents an issue of significant import to the national telecommunications sector – the proper basis for liability under an act regulating that industry. The Petition implicates issues attendant to the erroneous certification of a class in excess of 500,000 customers based on an errant reading of a federal statute, which interpretation eliminates the statutory elements to establish liability prior to a damages determination.

Section 206 of the federal Communications Act of 1934 ("Act"), 47 U.S.C. § 206, provides that a person who has been *injured by* a violation of the Act may thus prove liability, and thereafter prove damages. In a published decision, the Sixth Circuit held that "CenturyTel is liable if it violated § 201(b)" (Pet. App. at 24a) and thus disregarded in its Rule 23 analysis the import of two separate elements of a statutory claim under section 206: (1) injury to the claimant, (2) which was caused by a statutory violation. The Sixth Circuit did this by expressly merging the statutory *injury* and *causation* elements of the Act into its damages analysis, the result of which was the elimination of those prerequisites to liability.

The Sixth Circuit *conceded* that individual factual issues exist with respect to each and every class member, stating that although each "*will have to show that she did not enroll in WireWatch, ... that is relevant, ... to the issue of damages and not liability.*" (Pet. App. 24a. (emphasis added).) Respondents

likewise do not dispute the point that proof of each class member's enrollment is an individualized inquiry. But that individualized factual inquiry surrounding subscriber enrollment in WireWatch is relevant and necessary to prove *injury* – an express statutory element of liability. (*See* Pet. at 14-19.)

The presence of individualized liability issues bars class certification under applicable law. By mistakenly replacing the Act's required analysis of injury and causation with its discussion of damages (the individualized nature of which does not normally defeat certification), the Sixth Circuit *eliminated* those elements with respect to its typicality analysis under Rule 23(a) and its predominance analysis under Rule 23(b)(3). Thus, based on its incorrect interpretation of the elements necessary to establish liability, the Sixth Circuit's decision, affirming class certification, relieved each member of the certified class of 500,000 to 700,000 CenturyTel customers of their individual obligations to prove injury and causation as predicates to proving liability.

1. There Is No Basis For Respondents' Claim That Review Here Should Be Disallowed Because The Sixth Circuit Ruling Is Interlocutory

Respondents proclaim that this case does not "present a good opportunity" to address the elements of a claim under section 206 of the Act because certification decisions are "inherently interlocutory" (BIO at 9) and that Rule 23(f) appeals are not to be routine. (BIO at 11.)

CenturyTel petitions for certiorari pursuant to 28 U.S.C. § 1254(1). The Court's discretion to review cases in the courts of appeal is broad and virtually unlimited. *Forsyth v. City of Hammond*, 166 U.S. 506, 513 (1897) (the predecessor to section 1254(1) "expressed the thought of congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power"); *see also* 17 C. WRIGHT, A. MILLER, E. COOPER & V. AMAR, FEDERAL PRACTICE & PROCEDURE § 4036, at 8 (3d ed. 2008) ("The plenary nature of the power conferred by this provision [§ 1254(1)] is reflected in part by the general lack of technical restrictions on its exercise."). There is no bar to review of non-final judgments. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). This is precisely the case where this Court should intercede. Exercise of the power of review is appropriate where the lower courts have established an erroneous precedent as to elements of a claim pertaining to a federal statute regulating a national industry, resulting in the erroneous certification of a significant class.

Apart from review of interlocutory appeals under Rule 23(f), the courts of appeal have regularly reviewed interlocutory matters pursuant to 28 U.S.C. § 1292(b). The Court, in turn, has regularly reviewed those interlocutory decisions arising out of appeals taken pursuant to 28 U.S.C. § 1292(b). *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 717-18 (2005) (reviewing the Sixth Circuit's reversal of the district court's denial of a motion to dismiss); *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 21-22 (2004) (reviewing the Eleventh Circuit's reversal of the district court's grant of summary judgment); *Jones v. R.R. Donnelley &*

Sons Co., 541 U.S. 369, 374-75 (2004) (reviewing the Seventh Circuit's reversal of the district court's denial of summary judgment).

In support of their position, Respondents cite *In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002), *cert. den.*, 539 U.S. 904 (2003). (BIO at 11, 13.) But it was, in part, on the basis of *In re Delta Air Lines* that the Sixth Circuit granted CenturyTel permission to appeal in the first instance. (Pet. App. 31a-32a.) As the Sixth Circuit determined, the factors specified in *In re Delta Airlines* here warranted a Rule 23(f) interlocutory review:

> FED. R. CIV. P. 23(f) authorizes the courts of appeals to hear interlocutory appeals of class certification rulings . . . . However, the following factors support the acceptance of a Rule 23(f) interlocutory appeal:
>
> 1) if the class certification ruling is the death knell of the litigation; 2) if the appeal raises a novel or unsettled question; 3) if the petitioner has a likelihood of success on the merits of the appeal; and 4) if the posture of the case below supports an immediate appeal. *Id.*
>
> *Upon consideration of these factors, we conclude that interlocutory review of the class certification order in this case is warranted.*

Pet. App. at 31a-32a (citations omitted) (emphasis added).

Although review of interlocutory orders may be limited, such general bromides are not applicable here: *every* order as to which permission to appeal is sought and granted under Rule 23(f) is by definition interlocutory – as are appeals taken under 28 U.S.C. § 1292(b). Since the relatively recent promulgation of Rule 23(f) in 1998, appellate review of interlocutory orders granting or denying class-action certification was plainly authorized and permitted.[1] Rule 23(f) is, itself, a modification of the prior more limited philosophy of interlocutory review of class certification matters. *Cf., Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (certification is not a "final decision").

Rule 23(f) in no way limits this Court's authority and virtually unlimited discretion to review decisions of the courts of appeal by certiorari under 28 U.S.C. § 1254.[2]

Respondents claim that CenturyTel "fails to raise a serious question concerning generally applicable Rule 23 standards that might warrant review by this Court." (BIO at 12.) By equating a violation of the Act with liability, the Sixth Circuit omitted analysis of the distinct statutory requirements of injury and causation, and a review of the Sixth Circuit's opinion

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[1] Respondents' citation to and discussion of the "final judgment rule" (BIO at 10) is equally inconsequential inasmuch as Rule 23(f) explicitly permits interlocutory review.

[2] *See* FED. R. CIV. P. 23(f) advisory committee's note (1998) ("An order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

reveals no analysis of these distinct requirements. Because of this omission, and because injury and causation (and thus liability) cannot be proven on a class-wide basis, the Sixth Circuit completely failed to apply properly the applicable Rule 23 standards of both typicality and predominance of common questions. (*See* Pet. at 20-24.)

Requiring CenturyTel to defend the claims of a certified class of 500,000 to 700,000 customers based on the incorrect statement of the elements of the underlying claim very well may dictate the ultimate disposition of this case. This undoubtedly implicates a serious question, since there must be a "rigorous analysis" to determine "that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Further, the erroneous ruling below inescapably leads to a finding of liability as to all class members without regard to whether each – or any – class member can prove fundamental injury and causation or even standing. (*See* Pet. at 14-15, n.6.)

2. The Proper Enunciation Of The Elements Of A Claim Under Section 206 Of The Act Will Have A Broad Impact On The Telecommunications Industry And Is An Important Jurisprudential Standard

Respondents conclude that "a decision by this Court addressing the underlying facts likely would not have a material impact on current or future telecommunication industry billing practices." (BIO at 14.)

CenturyTel does not seek review of the "underlying facts." CenturyTel seeks review of the Sixth Circuit's interpretation of section 206 of the Act – an interpretation which plainly and improperly equated a statutory violation with liability – and ignored the distinct statutory requirements of injury and causation and its application in the context of this class action.

The decision below establishes a broad but erroneous jurisprudential standard. Section 206 applies to a host of potential violations of the Act, not simply billing practices. Section 206 applies to "any act, matter, or thing in this chapter prohibited or declared to be unlawful, or [where a carrier] shall omit to do any act, matter, or thing in this chapter[3] required to be done . . . ." 47 U.S.C. § 206. Indeed, the national breadth and jurisprudential significance of section 206 has been repeatedly demonstrated in dozens of cases. Such matters within the purview of section 206 include, by way of limited example:

- Failure to furnish communication service upon reasonable request in violation of section 201(a). *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002).

- Improper use of "call information" and other "customer proprietary network information" in violation of section 222(c). *Weinstein v. AT & T Mobility LLC*, 553 F. Supp. 2d 637, 639 (W.D. Va. 2008).

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[3] Courts have interpreted section 206 to mean that a common carrier shall be liable for any violation of Title 47 United States Code sections 151-615b.

- Failure to establish reciprocal compensation arrangements for the transport and termination of telecommunications in violation of section 251(b)(5). *Fitch v. Pub. Util. Com'n of Tex.*, 261 Fed. Appx. 788, 793-94; No. 07-50088, 2008 WL 148940, at *4 (5th Cir. Jan. 16, 2008).

- Failure to interconnect with networks of competing local exchange carriers in violation of section 251(c)(2). *Core Commc'ns, Inc. v. Verizon PA, Inc.*, 493 F.3d 333, 335 (3d Cir. 2007).

- Discrimination in favor of or subsidization of its own payphone services in violation of section 276. *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1079 (9th Cir. 2006).

- Interference with a telephone equipment manufacturer's business in violation of sections 202(a) and 203(c). *In re Edwards Indus.*, 74 F.C.C. 2d 322, 328 (F.C.C. 1979).

- Failure to file tariffs and cost data for public access line services provided to customer in violation of section 276(a). *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1242 (10th Cir. 2007).

The significance of a proper interpretation of section 206 extends well beyond the subject matter of this dispute and impacts the entire telecommunications industry.

3. The Sixth Circuit's Decision In Fact Conflicts With *Conboy*, And Respondents' Additional Arguments With Respect To That Conflict Are Unpersuasive

CenturyTel argued that the Sixth Circuit decision conflicts with the Second Circuit's decision in *Conboy v. AT&T*, 241 F.3d 242 (2d Cir. 2001). (Pet. at 25-29.) Respondents disagree. (BIO at 16.) With two points of minor rebuttal, CenturyTel reasserts its position that *Conboy* – which concluded that a mere violation of the Act will not result in liability without injury – cannot be reconciled with the Sixth Circuit's decision here that "CenturyTel is liable if it violated [the Act]." (Pet. at 24a.)[4]

---

[4] First, Respondents attempt to distinguish *Conboy* on the basis that the "*Conboy* plaintiffs ... could not point to a separate line item in their telephone bills reflecting a charge from AT&T for its compliance with privacy requirements." (BIO at 17.) This is no distinction, since here the challenged charge similarly did not "reflect" CenturyTel's billing clarity requirement – it reflected a charge for the WireWatch service which CenturyTel in fact provided to subscribers. Further, this supposed distinction is irrelevant since here – as in *Conboy* – there is no evidence or allegation that Plaintiffs were paying for a billing description, whether the cost for the service was itemized or not.

Second, Respondents state that even if "petitioner's contentions concerning *Conboy's* interpretation of the ... Act were substantively correct, such a holding on the merits could not be 'in conflict' with a decision upholding a district court's exercise of discretion in certifying a class." (BIO at 15.) The district court's exercise of discretion in certifying a class is neither the point of CenturyTel's citation of *Conboy* nor the issue presented by CenturyTel's Petition. That issue is the proper enunciation of the elements of the underlying cause of action under section 206 of the Act.

In further attempting to distinguish *Conboy*, Respondents cite *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), a case the Sixth Circuit relied upon, contending that "[c]lass certification is a procedural matter and Rule 23 does not give a 'court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" (BIO at 16; *see* Pet. App. at 10a.)

Subsequent to *Eisen*, however, the Court has repeatedly recognized that "evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). The class certification "determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 469 (quoting *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963)) (emphasis omitted). Indeed, "[t]he more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits . . . ." *Id.* at 469 n. 12.

The result in the instant case supports the appropriateness of the post-*Eisen* analysis and demonstrates the error in the Sixth Circuit's reliance on *Eisen*. Here, a class has been certified based upon an erroneous statement, and absence of analysis, of the elements of the underlying claim. Neither of the lower courts examined the "entanglement with the merits" as required by *Coopers & Lybrand*.

4. Statutory Interpretation Is Not A Matter Of Discretion, And Respondents Otherwise Do Not Successfully Defend The Sixth Circuit Ruling

Respondents leave for last their contention that the decision below is correct, claiming that the "Sixth Circuit correctly held that the district court acted within its discretion." (BIO at 18, heading.) But the correct interpretation of a statute (here, section 206) is not one that implicates an exercise of discretion. CenturyTel's argument is simple and straightforward: the Sixth Circuit failed as a matter of law to recognize that section 206 of the Act provides for a common carrier's liability only to a person who has been injured by the statutory violation. The class certification decision is erroneous because the injury and causation elements of liability under section 206 – when recognized and applied under Rule 23 – cannot be proven on a class-wide basis. (Pet. at 14-19.)

Respondents next contend that the insufficient bill description "deprived [each and every class member] of the opportunity" to object to those charges. (BIO at 19.) *This argument makes CenturyTel's individualized injury and causation argument exactly* – only those class members who can prove that they read their bills but did not understand the service for which they were being billed can prove such deprivation. *See* Pet. at 23 ("customers who did not read the 'services' portion of their bills (including the faulty billing description) were not *caused injury* by CenturyTel's billing description. Those customers were wholly unaware of what the billing description said . . . ."). Class

members who did not review their bills can establish neither those claimed deprivations nor liability.[5]

Respondents' various citations of authority simply do not address, much less answer, the presented question of the proper elements of a section 206 claim. Instead, Respondents press for a remand without review, which, as noted, will require CenturyTel, and potentially other entities subject to the Act, to defend a class action where individualized liability fact questions exist as to every class member.

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[5] Respondents in their Counterstatement of the Case reproduce an excerpt of the phone bill of named plaintiff Barbrasue Beattie, denoting (with emphasis) the "Non-Regulated Services" line item. (BIO at 4.) Respondents assert that only later, when the billing format was changed to reflect the charge as "Inside Wire Maint. Plan," were class members allowed to "recognize that the charge for 'Non-Regulated Services' was actually a charge for WireWatch." (BIO at 5.) Again, however, Respondents miss the point. As CenturyTel noted in its Petition, CenturyTel's WireWatch customers generally enrolled during telephone calls to arrange telephone service with CenturyTel, and CenturyTel's policy was not to enroll customers without their express consent. *See* Pet. at 4-5. Thus, Ms. Beattie's fact situation regarding her subscription to WireWatch is distinctive to her, proves nothing with respect to any other class member, and certainly sheds no light whatsoever on the issue presented: what are the elements of a claim under section 206?

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for writ of certiorari, Petitioner CenturyTel, Inc. respectfully requests issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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